

1 UNITED STATES DISTRICT COURT
 2 MIDDLE DISTRICT OF TENNESSEE
 3 NASHVILLE DIVISION

4 NEW CENTURY FOUNDATION)
 and SAMUEL JARED TAYLOR)
 5 VS) No. 3:18-cv-0839
 6)
 7 MICHAEL ROBERTSON, IN HIS)
 OFFICIAL CAPACITY AS DIRECTOR)
 8 OF TENNESSEE DEPARTMENT OF)
 ENVIRONMENT AND CONSERVATION)

9
 10 BEFORE THE HONORABLE ALETA A. TRAUGER, DISTRICT JUDGE

11 TRANSCRIPT OF PROCEEDINGS

12 October 4, 2018
 13

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Defense witness

MICHAEL ROBERTSON

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1
2 The above-styled cause came to be heard
3 on October 4, 2018, before the Hon. Aleta A. Trauger,
4 District Judge, when the following proceedings were
5 had at 3:09 p.m. to-wit:

6
7 THE COURT: Good afternoon. We're here
8 on a preliminary injunction application in *New Century*
9 *Foundation and Samuel Taylor versus Michael Robertson*
10 *in his official capacity as director of Tennessee*
11 *Department of Environment and Conservation.*

12 We have Van Irion for the plaintiff.
13 Hello.

14 MR. IRION: Yes, Your Honor. Hello.

15 THE COURT: Nice to meet you. We have
16 for the defendant Dawn Jordan.

17 MS. JORDAN: Yes, Your Honor.

18 THE COURT: And Jay Ballard.

19 MS. JORDAN: Yes, Your Honor.

20 THE COURT: And Sara Ohlman?

21 MS. OHLMAN: Yes, Your Honor.

22 THE COURT: From the Attorney General's
23 office. And Peako Jenkins also from the Attorney
24 General's Office. And Mr. Robertson is over there.
25 Okay, very good.

1 Do you have any testimony to present,
2 Mr. Irion?

3 MR. IRION: No, Your Honor. I believe
4 that the facts that are already established would
5 support the motion.

6 THE COURT: Okay. Does the defense have
7 any testimony?

8 MS. JORDAN: Yes. We would call
9 Mr. Robertson.

10 THE COURT: Let's go ahead and have the
11 testimony first, then.

12 MR. IRION: Okay. Your Honor, if I could
13 correct myself, Mr. Tyler, who is the signer of the
14 affidavit in support of our motion, just showed up. I
15 wasn't sure if he was going to be here. He might be
16 called if there's necessity to support certain facts.

17 THE COURT: Okay. You don't wish to call
18 him initially, just as rebuttal.

19 MR. IRION: Just as rebuttal, Your Honor.

20 THE COURT: Okay, that's fine. Come over
21 here.

22 **MICHAEL ROBERTSON**

23 called as a witness, after having been first duly
24 sworn, testified as follows:

25 MS. JORDAN: At a point of order, we also

1 would like to present the affidavit of Mr. Robertson.

2 THE COURT: Okay. You want to make it an
3 exhibit, that's fine.

4 MS. JORDAN: Yes. And I've spoken with
5 Mr. Irion beforehand.

6 THE COURT: Okay. We'll mark that as
7 Exhibit 1.

8 (Defense Exhibit No. 1 was admitted.)

9 **DIRECT EXAMINATION**

10 BY MS. JORDAN:

11 Q. Mr. Robertson, if you would start off
12 just telling us your name, introducing yourself.

13 A. I'm Michael Robertson. I'm the director
14 of operations for Tennessee State Parks in the
15 division -- in the Department of Environment and
16 Conservation.

17 Q. And you have been employed with the State
18 for 34 years?

19 A. I have 34 years of service with the
20 State, with Tennessee State Parks.

21 Q. And would you briefly take us through
22 your various positions starting with as when you were
23 a park ranger.

24 A. Yeah. I hired on in '86 as a park
25 ranger. I'd worked seasonally with state parks prior

1 to that. But '86 as a park ranger. Worked as a park
2 ranger in several parks across the state. In 2001 I
3 became a park manager. Then in 2010 became a park
4 area manager. And then was promoted to the director
5 of operations in 2012.

6 Q. So you've been the park director for
7 about six years now?

8 A. Yes, ma'am.

9 Q. And as a park ranger -- I see you have
10 the park ranger uniform on.

11 A. Yes, ma'am.

12 Q. Are you POST certified?

13 A. Yes, ma'am. We're commissioned law
14 enforcement officers for the state of Tennessee.

15 Q. And does that mean that you have been
16 through various law enforcement training and that you
17 have annual trainings that you attend?

18 A. Yes, I do.

19 Q. To maintain your POST certification?

20 A. Yes.

21 Q. Have you had experience with handling
22 large groups of people at various parks?

23 A. Yes.

24 Q. And can you briefly describe what rangers
25 do? What are their duties?

1 A. Rangers are tasked with a lot of
2 different duties. Of course, one of them is law
3 enforcement within the parks that we manage, but we're
4 also operation managers for the different functions
5 that are available within parks. So campground
6 operations, picnic shelter operations, retail
7 operations such as gift shops and other things.

8 They oversee the staff that work with
9 those different operations and lead in those efforts
10 there. They're also involved in interpretation and
11 education efforts that -- to share the story of our
12 parks and to educate people about the natural culture
13 of resources found within each of our parks.

14 They also are involved in resource
15 management activities within all of our parks, dealing
16 with the protection and preservation of those natural
17 and cultural resources to include removal of exotic
18 invasives or to do restoration efforts of protected
19 species that we're trying to ensure are there for
20 future generations to enjoy.

21 Q. So it's more than a law enforcement
22 position?

23 A. Yes, it is.

24 Q. Okay. And can you briefly describe your
25 duties as director of park operations?

1 A. As the director of park operations, I'm
2 directly responsible for the overall budget for
3 Tennessee State Parks, all 56 state parks, and all the
4 staff that carry out the day-to-day operations within
5 those state parks.

6 Q. Let's talk about the Montgomery County --
7 Montgomery Bell State Park including the inn and the
8 conference center. Let's talk about that for a
9 minute. Can you describe for the Court the park and
10 the amenities? What kind of park is it, what kind of
11 amenities does it have?

12 A. Montgomery Bell Park is one of our six
13 resort parks. So it has most, if not all, the
14 different types of amenities that we would offer
15 within a state park, to include managing over
16 4,000 acres of property, three lakes within that
17 property.

18 Has other water resources within the
19 property that we manage to ensure that they're kept
20 clean and available for people to enjoy. And within
21 those areas there's hiking trails, public access to
22 picnic shelters and picnic grounds. There's
23 campground, 52-site campground. Then there is a group
24 lodge, a group camp. There are cabins. There is a
25 golf course. There is the inn and conference center.

1 Q. Some of those amenities are
2 revenue-generating?

3 A. Yeah. Most of the overnight
4 accommodations such as campgrounds, the inns and
5 conference centers, the cabin operations that we have
6 are all revenue generation. Some of the day-use
7 facilities are revenue generating also, also.
8 Shelters through shelter rentals.

9 And then the retail operations that we
10 offer within those, at the inn and conference center
11 we have a restaurant, serves food every day. So that
12 generates revenue. We have gift shop operations
13 within the inn and conference center and also within
14 the park visitor center. So those generate revenue.

15 MS. JORDAN: Your Honor, I'm going to
16 show Mr. Robertson some pictures. I've handed these
17 and we've marked them as Exhibit No. 2 -- 3, sorry.
18 We've marked them as collective exhibit number, and
19 I'll just show them to Mr. Robertson and have him
20 define them.

21 THE COURT: Have you shown them --

22 MR. IRION: No objection. We've seen
23 them.

24 THE COURT: Okay. Collective 3, they'll
25 be admitted.

1 MS. JORDAN: We actually kind of talked
2 beforehand. So we've worked it all out.

3 THE COURT: Good, thank you.

4 MS. JORDAN: It's kind of faded out.

5 THE WITNESS: There you go.

6 MS. JORDAN: This is part of collective
7 No. 2. I guess we could probably mark that as
8 Exhibit 3A.

9 THE COURT: Wait, now I'm confused is
10 this Exhibit 2 or Exhibit 3?

11 MS. JORDAN: They're collective 3. So
12 maybe what we should do is mark it 3A, 3B --

13 THE COURT: That would be -- that would
14 be -- yes.

15 MS. JORDAN: Probably preferable. I
16 should have done that, I'm sorry about that.

17 THE COURT: That's okay.

18 BY MS. JORDAN:

19 Q. So we will mark this as 3A. Can you
20 describe what we see here in this picture?

21 A. Currently looking at a portion of
22 Montgomery Bell State Park that includes the inn and
23 conference center. That's Acorn Lake there in front
24 of it to the -- and the inn and conference center is
25 on that center point. Then you see two bridge

1 walkways that connect to other areas of the park. You
2 go to the right, that takes you over to the cabin
3 area. If you go to the left, it takes you to a
4 day-use area and swim beach and boat rental operation
5 that is in that area.

6 Q. Just so we understand, the inn and
7 conference center are in the foreground surrounded by
8 the water? Is that --

9 A. Yeah, it's on the middle point surrounded
10 by the water on three sides. And you're actually --
11 if you look at that building, you're looking in at the
12 restaurant area, and some of the room areas and the
13 conference center is on the backside of the building,
14 if you could make that out.

15 Q. Okay. Now we'll take a look at -- now
16 we'll take a look at what we'll mark as Exhibit 3B.
17 Can you describe what we see in this picture?

18 A. So that's just a closer-up view of the
19 view we just left where you can see the top portion of
20 the inn and conference area, the front part here
21 that's slanted is the restaurant area. The lower part
22 is part of the rooms.

23 You also see up at the top left a
24 building that extends out towards the top of the
25 picture. That is a whole wing of rooms with six

1 floors of rooms involved there. And then over to the
2 right you see a big square area, that's the conference
3 center that's tied to the rest of the main portion of
4 the inn there.

5 Q. And what we see in Exhibits 3A and 3B, is
6 that what New Century Foundation is seeking to
7 reserve?

8 A. They reserved this component -- they
9 reserved the inn and conference center. So the rooms
10 within the whole inn, the conference center and food
11 and beverage services within that conference center.

12 Q. Here we have what we're going to mark as
13 Exhibit 3C. Can you tell us what we see in this
14 picture?

15 A. Yeah, this is the front entry into
16 Montgomery Bell Inn. This is the -- if you just -- if
17 you imagine the last picture, you're looking from the
18 180 direction from that. So you're looking down at
19 the front of the inn. So this is the entryway in.

20 This walkway is the inn rooms with the
21 six floors of rooms involved in it that's coming out
22 towards you. And to your left is the -- what would
23 take you over to the conference center area.

24 Q. And then finally Exhibit 3D?

25 A. Yes. So this is just right down from the

1 picture that we just had on the left. This is the
2 conference center itself. That's attached to the inn
3 component.

4 MS. JORDAN: Your Honor, I will get these
5 marked appropriately and we would ask that these be
6 introduced into evidence.

7 THE COURT: Yes, they'll be received.

8 (Defense Exhibits Nos. 3A-D were
9 admitted.)

10 BY MS. JORDAN:

11 Q. How many hospitality staff are there at
12 the park?

13 A. It varies from season to season, but we
14 have a total of around 90 positions that are within
15 the inn and conference center at Montgomery Bell.

16 Q. And can you tell us what is the overall
17 occupancy rate of the inn and conference center during
18 the year?

19 A. It has an average occupancy of about
20 31 percent for year-round occupation. Most of its
21 occupancy is on weekends, especially throughout the
22 summer season and early spring -- spring through fall,
23 high park visitation time periods.

24 Q. Did I interrupt you getting some water?

25 A. Yeah, I was trying to, but I can't figure

1 out how to get the water out.

2 THE COURT: Maybe the CSO can help you.
3 You have to unscrew the top a little bit.

4 THE WITNESS: I just didn't do it far
5 enough. Go ahead.

6 BY MS. JORDAN:

7 Q. Is there a higher occupancy over the
8 weekends generally?

9 A. Yeah. Yeah, we're probably about
10 80 percent occupied for the weekend periods if you --
11 especially during April through October.

12 THE COURT: I'm surprised it's not
13 100 percent.

14 THE WITNESS: We're trying to get there.

15 BY MS. JORDAN:

16 Q. So what about -- let's take May, for
17 example. Is that a busy month for you?

18 A. Weekends would be about 100 percent
19 occupied on the weekends in May. It's a prime season
20 for people to get out and -- they've been couped up
21 all winter long, and they're ready to get out and
22 enjoy the parks. We have a good occupancy rate during
23 that time.

24 Q. If you could, the last New Century
25 Foundation meeting was held at the inn and conference.

1 What was going on that weekend?

2 A. That was a very busy weekend at the park.

3 THE COURT: When was this?

4 THE WITNESS: That was April -- it was a
5 weekend in April. I don't remember.

6 THE COURT: April of 2018?

7 THE WITNESS: Yes. And we had -- if you
8 remember the picture of the -- so we had all the
9 campground sites booked for the weekend. It was 100
10 percent occupied for the weekend. We had all picnic
11 shelters rented within the park, and there's six
12 picnic shelters within that park.

13 We had our group camp rented with 250
14 Girls Club members in that group camp. We had a golf
15 tournament going on, Tennessee Seniors Tournament
16 going on at the golf course for that weekend. We had
17 a triathlon that was going on at the swim beach area,
18 which is just on the other side from the inn and
19 conference center during that time.

20 BY MS. JORDAN:

21 Q. Let's talk about just the inn and
22 conference center for a moment. Once the rooms at the
23 conference center and the inn are reserved, who sets
24 the parameters for who is allowed into those spaces?
25 Is it the reserving party?

1 A. It's the reserving party. I mean,
2 they -- if they -- once they reserve the rooms or
3 facility, it's theirs to use and it's not open to just
4 anybody else to come in.

5 Q. And how often have you had a group
6 reserve the entire inn and conference center?

7 A. That's pretty rare that they do it --
8 they reserve it all, but we've been working with New
9 Century Foundation and some other groups to
10 accommodate their conferences and working with them to
11 reserve the whole facility.

12 Q. Are those private meetings?

13 A. They're private meetings from my
14 understanding, relative to you have to pay to come to
15 the conference. You have to be credentialed through
16 them to attend their meetings.

17 Q. Have you ever rejected anyone at their
18 request?

19 A. We have -- if they've had people that
20 have come -- come to the inn that weren't credentialed
21 and were not approved to come in, we made sure they
22 leave the area.

23 Q. Okay. Can you describe for us what the
24 New Century Foundation does in terms of making sure
25 that only those people who are approved are allowed

1 into this space? What measures do they take?

2 A. I know that they keep a list of those
3 that have registered for the conference. They set up
4 a check-in station as you come into the foyer of the
5 entry to the inn, and they verify all attendees to
6 ensure that they're paid conference attendees. And,
7 you know, verify them from that standpoint. If
8 they're not paid or not part -- on their list, then
9 they're not allowed to come into the conference, from
10 my understanding.

11 Q. Are there any measures that park staff
12 takes to make sure that nobody comes into the inn and
13 conference center that is not supposed to be there for
14 that private meeting?

15 A. We work with them, if they identify
16 anybody that's not supposed to be there, to escort
17 them off of the premises. As I mentioned earlier, the
18 only other things that we've done with this particular
19 group is implement security measures where we ensure
20 that nobody's carrying any illegal weapons or anything
21 into the conference center.

22 THE COURT: Is that at their request?

23 THE WITNESS: It's at their -- at a
24 request for the issues associated with this event.

25 THE COURT: Well, do they request that

1 you make sure weapons do not come in?

2 THE WITNESS: It's part of the security
3 measures that we've set down and agreed upon
4 associated with their event that they're having.

5 THE COURT: So they agree that you should
6 be doing that.

7 THE WITNESS: Yes. Yes.

8 BY MS. JORDAN:

9 Q. And are there any measures taken with
10 respect to the parking lot at the inn and the
11 conference center? Can just anybody come into the
12 parking lot is what I'm basically asking.

13 A. For this conference we -- because there
14 had been intel relative to protests associated with
15 this conference, we did set up measures to ensure the
16 safety of the conference attendees and our staff that
17 worked within the inn and conference center.

18 And we did establish that certain parking
19 areas were for conference attendees and others were
20 restricted to support staff for the security of the
21 event.

22 Q. And the Judge's question would apply to
23 that, that same security measure. Is that something
24 that was agreed upon with the group?

25 A. Yeah. We talked with them about the

1 security measures and what we had in place. So they
2 were aware of what we were doing.

3 Q. So does New Century Foundation allow
4 everyone into the facilities or just certain people?

5 A. Only people that they allowed into their
6 conference center and their meetings and the facility
7 that they rented are those that have been registered
8 to attend the conference or have been credentialed by
9 them to be there.

10 Q. And what about media for the event? How
11 does New Century Foundation handle that?

12 A. They have some media that they've
13 credentialed to come in and conduct interviews with
14 them. We've worked with them on media requests that
15 have come to our department. And it's up to them to
16 determine whether they want to meet with them or not.
17 But if they credentialed them to come in, they can
18 come in. If they don't, they don't come in.

19 Q. And what is your strategy for handling
20 the event in terms of the protesters that come to the
21 event?

22 A. Well, the strength -- so are we talking
23 about the event for this last event? Because we've
24 been -- we've been working with New Century Foundation
25 for -- since 2011 relative to conferences at

1 Montgomery Bell. And our response to that has changed
2 over the years based off of the protests that have
3 developed relative to their conference coming to
4 Montgomery Bell.

5 This last year we set up clear zones
6 within the park at the -- at the inn and conference
7 center. Zones that were for the conference attendees
8 to be in and, you know, free to do whatever they
9 wanted to do in those areas.

10 And then we set up a zone for protest
11 groups to come in and, you know, express their First
12 Amendment rights relative to the conference being at
13 the park.

14 And then we also set up a neutral zone
15 that was just for security that was there for the
16 event to assure that the conference was held and we
17 met our obligations to provide a safe and secure place
18 for the conference. We met our obligations to provide
19 a safe and secure place for the public to come in and
20 share their opinion about the event that was happening
21 at the park.

22 Q. And did that work fairly well last time?

23 A. Yeah, we had no -- no major incidents
24 associated with that. We had -- we did make some
25 arrests out of the protest area relative to some items

1 that were being brought in that were illegal to the
2 protest area. Arrests were made and those people were
3 transported off the property.

4 THE COURT: What kind of items?

5 THE WITNESS: Drugs.

6 THE COURT: What? Drugs?

7 THE WITNESS: Yeah. Mostly marijuana.

8 BY MS. JORDAN:

9 Q. Has New Century Foundation expressed
10 gratitude to the park department?

11 A. We've heard from them in appreciation for
12 our efforts. They expressed that appreciation and the
13 desire to continue to use our facilities for their
14 conference.

15 MS. JORDAN: Your Honor, we've
16 appropriately marked Exhibits 3A through 3D. So we'd
17 ask that those be admitted.

18 THE COURT: We'll give those to
19 Ms. Beasley. Those will be in evidence. Okay.

20 MS. JORDAN: And then as Exhibit 4 -- and
21 I have shown these to Mr. Irion. Am I pronouncing
22 that correctly?

23 MR. IRION: Irion. That's okay.

24 MS. JORDAN: Irion, I'm sorry. And he
25 has agreed that these can be admitted as evidence and

1 this will be Exhibit No. 4.

2 THE COURT: That's fine. What is
3 Exhibit 4?

4 MS. JORDAN: It is -- it's a couple of
5 emails that Mr. Taylor sent to the park department
6 expressing his gratitude for what the park department
7 did for their event.

8 THE COURT: Okay, let me just read these.
9 These are dated May 1 and May 3. We'll mark this as
10 Exhibit 4.

11 (Defense Exhibit No. 4 was admitted.)

12 BY MS. JORDAN:

13 Q. So now let's talk about the new contract
14 and the new provisions that are at issue here.

15 MS. JORDAN: Your Honor has seen a copy
16 of the contract?

17 THE COURT: Yes, it was attached to the
18 complaint or was attached to something. I have it.
19 Attached to the complaint, I believe.

20 MS. JORDAN: Yes. And for Exhibit 2 I
21 just have a copy of the form contract. And I've shown
22 it to Mr. Irion, and he agrees it's going to be
23 admitted into evidence.

24 THE COURT: Is this the contract that was
25 attached to Mr. Ryan's declaration, the earlier

1 contract?

2 MR. IRION: This was attached to the
3 complaint, Your Honor.

4 THE COURT: So you're talking about the
5 new contract.

6 MS. JORDAN: Yes, Your Honor.

7 THE COURT: And that's going to be
8 exhibit what?

9 MS. JORDAN: 2.

10 THE COURT: Exhibit 2 is the new
11 contract, okay. And that comes in without objection.
12 So we'll mark that. Okay.

13 (Defense Exhibit No. 2 was admitted.)

14 BY MS. JORDAN:

15 Q. That's all the exhibits that I have, but
16 let's just kind of go through the contract overall.
17 Why has the contract changed to have a security
18 deposit and a cost recovery measure added to it this
19 year?

20 A. There's several things that kind of roll
21 into this. As the director of operations I'm
22 responsible for making sure that Tennessee State Parks
23 operates within the budget that is established for it.
24 And our budget is established off the State
25 appropriations and revenues that we generate.

1 THE COURT: Can you raise your voice a
2 little bit? Having a little trouble hearing. That
3 chair doesn't move, but the mic moves. You can move
4 the mic closer to you.

5 THE WITNESS: Do I need to repeat
6 anything?

7 THE COURT: You're responsible for
8 staying within the budget.

9 THE WITNESS: Budget and generating the
10 revenues that we're required to do. We also have
11 legislative mandate to TCA 11-3-305, which requires us
12 to operate our retail hospitality operations, which
13 includes inn, conference centers, cabins, campgrounds,
14 gift shops and other things as self-sufficient
15 operations.

16 So as the director of operations, I have
17 to review those operations every year, see that we're
18 operating within the budget, that we're meeting our
19 requirements legislatively to be self-sufficient and
20 look at our ability to recover costs associated with
21 operations that have -- we're having issues meeting
22 those goals.

23 We -- in the last several years Tennessee
24 State Parks has become a popular place to come and
25 hold group events and activities within our parks. In

1 review of our group contract we found that the
2 language associated with those group contracts was not
3 strong enough to help us in our cost recovery efforts
4 for providing events and activities at our parks to
5 ensure we met our legislative mandate to be
6 self-sufficient.

7 So we looked at that and determined that
8 we needed to implement measures to strengthen our cost
9 recovery language within those contracts.

10 BY MS. JORDAN:

11 Q. Was it an attempt to keep New Century
12 Foundation from coming to the park?

13 A. It's only an attempt to recover costs
14 associated with events that come on. We had had
15 several events at some of our other parks. We've got
16 the Bicentennial Mall State Capitol Park, which is in
17 downtown Nashville, and the Nashville community has
18 expressed an interest in using that as a venue.

19 In that, we've had the New Year's Eve
20 come in with additional costs associated with that, an
21 expense to us where we had to implement cost recovery
22 language within those contracts and agreements. And
23 we have part of the efforts of driving revenues
24 associated with managing our state parks and
25 legislative intent for us to become less and less

1 dependent upon tax dollars to support our state parks
2 and more dependent upon our ability to generate our
3 own revenues.

4 We've looked at all kinds of measures to
5 implement cost recovery to ensure that we're not doing
6 things only as a service, but also as a -- you know,
7 from a business standpoint, actually covering our
8 costs for providing those services.

9 Q. Is the contract only applicable at
10 Montgomery Bell State Park?

11 A. No, it's across the system.

12 Q. Do you know how many of these new
13 contracts that you have entered into this year?

14 A. We've entered into about 61 to 65. I
15 think we have 61 and we had some in the works the last
16 that I looked at that, of the new contracts that are
17 in place.

18 Q. And let's talk about what is actually
19 charged to the group that reserves the place. Now, is
20 the group charged for any damages that are caused by
21 other people who are using park facilities?

22 A. No, the language within those contracts
23 are associated with the particular group that we're
24 entering into the contract. They would only be
25 charged for any damages or additional security fees or

1 anything associated with helping, you know, to carry
2 out their event.

3 So if their attendees created damage,
4 they would be charged for those damages to recover our
5 costs associated with them. If their event needed
6 additional security or other measures in excess of
7 what we normally provide, then those would be charged
8 as cost recovery measures associated with that.

9 Q. And, for example, would the New Century
10 Foundation be charged for any damage that the
11 protesters cause?

12 A. No, we would -- we would pursue that
13 through other means relative to recoup costs
14 associated with their activities.

15 Q. And let's talk about this -- New Century
16 Foundation. In addition to park staff, are there
17 other -- are there other state resources that are
18 called upon to provide security and other measures?

19 A. For the last -- the last year we have had
20 to reach out to additional state agencies to provide
21 additional security associated with the event because
22 the attention of their event has brought more interest
23 in protesting, and social media and intel associated
24 with that that indicated that a need to increase our
25 ability to respond.

1 It's also in -- was also in response to
2 the relationship that we've had with New Century
3 Foundation and the American Renaissance Conference
4 that they've had there for years. Our initial
5 response with them was limited security associated
6 with their events over the years because that was all
7 that was needed.

8 In 2015, I believe was the first time
9 that we really had a significant protest group that
10 showed up, and we managed that solely with our staff
11 at the park and staff resources that we pulled from
12 within Tennessee State Parks.

13 And the protest efforts there were
14 significant to the point that we were concerned about
15 our ability to be able to ensure conference attendees
16 and our staff's security. Plus dealing with the
17 security of those that came to protest the event.

18 It ended with an incident of a conflict
19 between one of the protesters and one of the
20 conference attendees where they engaged in a
21 fistfight. And in that arrests were made on both
22 sides associated with that encounter.

23 And weapons were retrieved from that
24 event, which raised and heightened our concern about,
25 you know, the measures that were being taken to ensure

1 the safety of those in attendance.

2 THE COURT: So who do you get these
3 additional resources from?

4 THE WITNESS: So we reached out through
5 our other state agencies within the State of
6 Tennessee. So we had help from the Tennessee Highway
7 Patrol, Tennessee Bureau of Investigation, Tennessee
8 Department of Corrections. We also had some intel
9 help from the Federal Bureau of Investigation
10 associated with this event. So in that -- in response
11 to this last -- do you want the numbers associated
12 with what type of response we had?

13 BY MS. JORDAN:

14 Q. No, just general I think is pretty much
15 what the Court needs. So we're talking -- we're
16 talking troopers, TBI agents?

17 A. We also had Tennessee Wildlife Resource,
18 some of their agency. Since we had the lake around
19 it, they provided some boats and security. We'd had
20 some issues in previous years with protesters probing
21 around the inn and getting into areas that they
22 weren't permitted to be in. And that was part of the
23 case associated with the fight that happened. So we
24 had TWRA, Department of Corrections, THP and TBI.

25 Q. And will the Parks Department charge New

1 Century Foundation for those resources, the troopers,
2 the TBI, the TWRA, those other things that you
3 mentioned?

4 A. So the language associated in the
5 contract relative to cost recovery is only associated
6 with the cost associated to Tennessee State Parks. So
7 the cost for us to help facilitate and carry out their
8 event.

9 So when we look at those costs recovery,
10 it's not associated with any additional resources that
11 have to be called in because of protests associated
12 with that event. Those resources are covered by their
13 own departments. And it's part of the State's
14 response to the activities that are happening at the
15 park during that day.

16 THE COURT: I'm not -- I'm not sure I
17 understand. You're saying that highway patrol, they
18 just cover that. That's -- if they want to bill New
19 Century, that's not any of your business; right?

20 THE WITNESS: Yes, ma'am.

21 THE COURT: But -- and the Tennessee
22 Department of Correction and all these other agencies,
23 you have called them in because you felt you needed to
24 have them there, but the only cost recovery that will
25 come out of this security deposit will be expenses

1 incurred by your department. Yes?

2 THE WITNESS: That is correct.

3 THE COURT: Okay, thank you.

4 MS. JORDAN: Thank you, Your Honor.

5 THE COURT: So that would be, for
6 instance, you would bring in more park rangers?

7 THE WITNESS: In this particular case we
8 had to bring in about 25 additional park rangers from
9 across the state, so that pulls resources from the
10 other parks and their day-to-day activities. So we
11 bring them in to help to support the existing -- we
12 only have five uniformed staff at Montgomery Bell.

13 THE COURT: Okay.

14 MS. JORDAN: So we have to bring that in
15 to support them in that effort.

16 THE COURT: Okay.

17 BY MS. JORDAN:

18 Q. And prior to the event, in terms of
19 criteria for determining the resources that you will
20 need to cover the event -- may I see Exhibit No. 1 so
21 we can go over the...

22 THE COURT: What are you looking for?

23 MS. JORDAN: Mr. Robertson's affidavit.

24 THE COURT: Oh, I have it up here.

25 MS. JORDAN: Do you still need it,

1 Your Honor?

2 THE COURT: No, no, that's okay.

3 BY MS. JORDAN:

4 Q. I'll just read them to you and then we'll
5 kind of go over the -- would that help you?

6 A. Sure.

7 Q. Now, the criteria that are used to
8 determine the amount of staffing -- and you have seven
9 of them, so let's talk about them one at a time.
10 No. 1 is the facility or facilities reserved. Can you
11 go into a little bit more of that, please?

12 A. So the facilities reserved could depend
13 upon what staff and resources are available at the
14 park associated with those facilities and resources.
15 So are we going to need to bring additional staff in
16 and additional support in to help carry out this
17 event. So we look at that to determine are we going
18 to be able to accommodate that.

19 Q. You mentioned the time of the year of the
20 reservation, which takes into account the probable
21 weather and other considerations of the year. For
22 example, high traffic times of the year?

23 A. Yeah.

24 Q. Can you explain that?

25 A. So is the event inside, outside, what

1 time of the year is it going to happen. Are we going
2 to have to deal with weather conditions or whatever
3 associated with the event. Is that going to require
4 us to bring in additional resources to help
5 accommodate that. The time of the year is going to --
6 we have to look at what does that mean relative to an
7 impact to the system, if we need to bring additional
8 resources from other areas. And we still have
9 obligations that we need to meet in those areas, can
10 we do that to accommodate the event and help with the
11 event.

12 Q. I didn't mean to interrupt you, I'm
13 sorry.

14 A. That's all right.

15 Q. For example, you mentioned earlier that
16 May is a busy month --

17 A. Right.

18 Q. -- for the park?

19 A. Yeah. We're opening up for the summer
20 season. Kids are getting out of school.

21 Q. And you have golf tournaments and
22 triathlons and campgrounds are full and that kind of
23 thing --

24 A. Yes, ma'am.

25 Q. -- during the time that New Century

1 Foundation proposes to hold their event?

2 A. Yes, ma'am.

3 Q. That's what we're talking about. Okay.

4 And 3, the time of day that the event is to take
5 place, including evaluation of events which are to
6 occur over multiple days. Can you flesh that out for
7 us a little bit?

8 A. So when we talk about time -- so what
9 time of the day when events would occur, do we have
10 existing staff there to accommodate that or -- it's
11 similar to the staffing and resources needed to carry
12 out the event. If it's going to extend -- be extended
13 over a long period of time within a day, then do we
14 have enough staff to cover those hours associated or
15 are we going to have to come in and supplement those
16 hours.

17 If it's extended over several days, you
18 know, the same philosophy there. Tennessee State
19 Parks are not open 24/7. We do not staff it the same
20 all 24/7. We adjust our staffing based off of what's
21 happening within the park.

22 So we would make -- have to make staffing
23 adjustments associated with an event based off the
24 time of day, extent of time, length of the event and
25 how long it's going to run. So we would be looking at

1 all of that.

2 Q. And then No. 4, the revenue-generating
3 impact of the group's reservation on the use of other
4 park facilities. Can you describe that for us a
5 little bit.

6 A. So as a group rents -- one thing you look
7 at the revenues associated with the costs for putting
8 on the event. Are we generating enough revenue to
9 cover the costs. If we're going -- if the event
10 requires us to close other areas to help accommodate
11 the event, we've got to determine whether the revenues
12 for that event offset the closure of a park area that
13 might have other revenue-generating opportunities
14 there.

15 So we have to look at what are they
16 asking for, what are the impacts based off of what
17 they're asking for. Is it going to have an impact on
18 our ability to generate revenues in other areas and is
19 the revenue that we're generating off of that event
20 worth shutting other things down that typically would
21 be open to the public or whether, you know, we can
22 keep that open and still accommodate that event. So
23 we have to look at all those factors.

24 Q. And then No. 5 is the security of park
25 staff inside the reserved facilities that are

1 reasonably required to protect the facilities from
2 harm and who are required to work the event under the
3 group reservation.

4 A. Yeah. So we need to understand the
5 nature of the event and what does that mean to -- to
6 the safe work environment for our staff associated in
7 the event. Helping to carry out the event.

8 So we look at those factors. One to make
9 sure we have enough staff there to be able to do it
10 safely and to accommodate the event and meet the event
11 needs. And otherwise implementing measures to ensure
12 that we ensured our staff safety and the public that's
13 attending the event, their safety.

14 Q. And No. 6, the estimated number of
15 participants in the group making the reservation, can
16 you describe that a little bit?

17 A. So we need to have an understanding of
18 the number of people that are coming in. 1, does the
19 event actually accommodate that many people. How many
20 parking areas are we going to need, how many
21 conference space or room space we'll need.

22 Or in the case of some events like the
23 New Year's Eve party which is a hundred thousand, you
24 know, can we accommodate that within the Bicentennial
25 Mall. And if we are, what does it mean to you. Do

1 you rent part of it or do you get the whole thing?

2 So we have to, you know, have those
3 discussions about how we're going to accommodate the
4 event and understanding the numbers and how many's
5 coming helps us prepare for that.

6 Q. The 7, the estimated number of viewers,
7 including media?

8 A. That's relative to understanding the
9 total impact of visitation that's going to be brought
10 in by the event and how do we respond to that.

11 Q. And in terms of -- you mentioned
12 intelligence earlier with respect to deciding how to
13 handle the protests and the other aspects to it. Does
14 Mr. Taylor provide any support or in any --

15 A. Mr. Taylor has worked with us well in
16 providing us updates on information that he's received
17 about potential protest groups that will be coming
18 into the event. Sharing with us social media posts
19 that they've received relative to different protest
20 groups and estimates on numbers of people that have
21 said that they were interested in attending those
22 protests or whatever.

23 So he's worked with that. We've also
24 worked with TBI and the FBI on intel relative to these
25 events so that we have an understanding of the numbers

1 that we may have to be dealing with.

2 Q. And so the discussions that you have with
3 Mr. Taylor, in particular, that's part of the
4 dialogue --

5 A. Yes.

6 Q. -- that you have with respect to
7 determining what to do about this event?

8 A. Mr. Taylor has worked very closely with
9 our park manager at Montgomery Bell in sharing
10 information about their event. Park manager's worked
11 well with Mr. Taylor about trying to accommodate their
12 needs to ensure that we meet our obligations
13 associated with their rental of the facility and
14 holding their conference. And our ability to ensure
15 their safety while they're there and the general
16 public's safety while the event is going on.

17 Q. Now, let's say that if it becomes
18 apparent that the response to the event will not be as
19 great as expected. Let's say you expected 2,000
20 protesters and 200 showed up, something like that.
21 Would you send some of the people home that you have
22 brought to the event?

23 A. So all this is relative to the discussion
24 that we've had earlier about my responsibilities in
25 managing a budget. So bringing resources in and out

1 are initially my expense. So I have to be able to
2 justify all those expenses. So we do monitor the
3 events and based off of the intel that we receive from
4 wherever we receive it from, if we feel that resources
5 are not needed, we will send those back because I need
6 them to carry out their work at the parks where we
7 borrowed them from for this event. So we send them
8 back --

9 THE COURT: Would you send park rangers
10 back before you tell the Tennessee Highway Patrol that
11 they can leave? Who would go back first?

12 THE WITNESS: It's -- it's a discussion
13 with those agencies about our overall response to the
14 event. So it really depends on what event you're
15 talking about and what resources are involved. If
16 it's -- part of it is it is a Tennessee State Park
17 event. So we do feel some responsibility to carry out
18 our portion of the response associated with the event.

19 But we also -- if the event's big enough,
20 we also understand that we need resources outside of
21 our capabilities to come in and support us. So
22 depending on what we -- what we get from the intel
23 about this event is not going to be as big as it needs
24 to be or maybe it's moving in some different
25 directions, then resources be reallocated in different

1 directions or sent back to their normal shifts or
2 normal responsibilities.

3 THE COURT: But the park rangers would be
4 perhaps the last ones to be sent back to Henry Horton
5 or Fall Creek Falls.

6 THE WITNESS: They would be in the last
7 group to be considered relative to that, but if they
8 were needed to help -- so we would also look at the
9 staff that we brought in and with an understanding of
10 what's happening in the parks that we borrowed them
11 from, we may determine that we're going to let some of
12 these go and make the request to THP or whatever that
13 they can keep some of their staff in to help them.

14 THE COURT: Okay. So it's a real fluid
15 situation?

16 THE WITNESS: It's fluid. You really
17 have to look at what's going on at the time that
18 things are happening across the state.

19 BY MS. JORDAN:

20 Q. And then when the charges come after the
21 event or they're determined after the event, the
22 charges would be for what was actually incurred or
23 what you anticipated?

24 A. Only for what was actually incurred.

25 Q. Now, the criteria that we just fleshed

1 out, do those apply to any assessment of needs for
2 group reservations to all group --

3 A. Yes.

4 Q. Let's take an example that Taylor Swift
5 planned to hold her birthday party at the inn and
6 conference center and she expected 300 attendees.

7 A. Right.

8 Q. Would you expect increased costs
9 associated with that event?

10 A. There would be some. Depending on the
11 nature of what all they wanted to do at the event
12 would determine what those might be.

13 THE COURT: And how much publicity there
14 was --

15 THE WITNESS: Right.

16 THE COURT: -- or social media there was.

17 THE WITNESS: That could all change it.

18 BY MS. JORDAN:

19 Q. Or a Taylor Swift concert or any concert,
20 would you anticipate an increased cost?

21 A. Oh, yeah. Oh, yeah.

22 Q. And what about something like a poker
23 tournament or a euchre tournament that's held 24/7
24 over a weekend and that's 250 to 300 attendees, ESPN
25 is expected to cover the event. Would you expect

1 increased costs from that?

2 A. Oh, yes.

3 THE COURT: Really? A euchre tournament?

4 THE WITNESS: I don't know what a euchre
5 tournament is. I figure if it's bringing additional
6 people in, it's going to have additional cost. We
7 would seek costs recovery associated with that.

8 MS. JORDAN: To be fair, I said ESPN
9 would be involved in it.

10 THE COURT: Okay.

11 MS. JORDAN: I just had to bring that in.

12 BY MS. JORDAN:

13 Q. Now, when you apply the criteria to
14 determine what will be needed, does it matter what
15 kind of group it is?

16 A. No.

17 Q. Okay. And Mr. Robertson, do you care
18 about this group and their speech? Does that have a
19 bearing on any of this?

20 A. It has no bearing to me. Our state parks
21 are open to everybody, and we want everybody to have
22 an opportunity to come in and enjoy them. We've had a
23 pretty good relationship with the New Century
24 Foundation associated with this conference.

25 And there have been no issues with their

1 conference being at the park, other than the one
2 conflict. And we don't blame that on New Century
3 Foundation. It was just an incident that occurred
4 that raised our attention to whether or not we're able
5 to provide adequate security for the event.

6 MS. JORDAN: May I have a moment to
7 discuss with my colleagues.

8 (Pause in proceedings.)

9 MS. JORDAN: That's all we have for
10 Mr. Robertson at this moment.

11 THE COURT: All right. Mr. Irion,
12 cross-examination?

13 MR. IRION: Yes, Your Honor. Thank you.

14 **CROSS-EXAMINATION**

15 BY MR. IRION:

16 Q. Now, your name's Mike Robertson. I don't
17 know what -- I know you're the director of --

18 A. Operations.

19 Q. Operations. Do you prefer Ranger
20 Robertson, Officer Robertson, Mr. Robertson?

21 A. Mike.

22 Q. Mike.

23 THE COURT: Well, he can't call you Mike
24 in my courtroom, sorry.

25 THE WITNESS: You can call me Director if

1 you wanted to.

2 BY MR. IRION:

3 Q. Okay, great. Director Robertson, my name
4 is Van Irion. I represent the plaintiffs in this
5 case. Thank you for being here today.

6 Now, the new contract that you have, that
7 came into effect when?

8 A. It came into effect May the 8th.

9 Q. Of this year?

10 A. Of 2018. Of this year.

11 Q. And that was directly after the new --
12 previous New Century Foundation event; correct?

13 A. It was shortly thereafter. It wasn't
14 directly. The New Century Foundation event was in
15 April. And this was the first of May.

16 Q. Sure. And that was because of what
17 happened at the New Century Foundation event; correct?

18 A. No, it was something that we'd been
19 looking at relevant to cost recovery. We'd
20 implemented a -- we'd looked at the National Park
21 Service as far as a special use event language that
22 they have due to the demand for groups that are coming
23 in to use our parks as venues. And in it it had some
24 cost recovery language associated with it.

25 And as I said before, we'd been reviewing

1 our group contract and realized that we had some
2 language in there -- or there wasn't strong enough
3 language in there that we felt that we could pursue
4 cost recovery associated with other group events that
5 we've had within state parks, which had prevented
6 Tennessee State Parks in the past for seeking cost
7 recovery efforts associated with the groups that had
8 come in.

9 Q. I understand, but, now, you're not trying
10 to testify -- or you're not testifying that the fact
11 that New Century Foundation event happened in April
12 and the new policy was in effect in May is a complete
13 coincidence, are you?

14 A. I would tell you that, you know, the
15 events associated with the New Century Foundation
16 conference, the American Renaissance Conference and
17 the number of protests associated with that and the
18 resources that come in brought -- opened our eyes
19 relative to the costs associated with the conference
20 and how do we ensure that we're meeting our
21 self-sufficiency requirements and have -- do we have
22 measures in place to, you know, implement cost
23 recovery so that we ensure that we meet those
24 self-sufficiency requirements.

25 Q. So would it be safe to say that the

1 new -- previous New Century Foundation event was at
2 least a factor that caused the new policy? I'm just
3 trying to understand what you're saying here. I'm
4 trying to simplify it.

5 A. I will say that the previous New Century
6 conferences, specifically one where we had to arrest
7 people relative to the conflict, brought into question
8 our security abilities and did generate the need to
9 update security measures associated with the
10 conference which, in turn, resulted in additional cost
11 to the department.

12 Q. Sure. Okay. Now, you said several times
13 during your testimony that sometimes you have to bring
14 in more security than -- for certain events than for
15 other events; correct?

16 A. Yes.

17 Q. Who decides how much security is
18 required?

19 A. We -- that is decided by those that are
20 involved in setting up the security measures
21 associated with the event. Sometimes it involves the
22 event planners. Sometimes it involves the resources
23 that we have available within the State to determine
24 what is a proper response.

25 But it's difficult to assess actual

1 needs, you know, on -- you know, on kind of an
2 across-the-board standard of what we're going to do.
3 You have to assess each event individually and
4 determine what you need to do.

5 Q. Sure. So is it safe to say that the
6 likelihood that the event is going to be protested
7 would certainly be a factor in how many officers you
8 would have available?

9 A. Sure.

10 Q. And exactly -- at the end of the day -- I
11 know you discussed it with other people -- who is the
12 government official that makes the decision to have
13 additional officers there or not? Would that be you?

14 A. We work in conjunction with -- I make the
15 determination relative to the state park resources
16 that are associated to the event.

17 Q. Okay.

18 A. We work in conjunction with our
19 departments about their ability to assist with those
20 resources.

21 Q. Uh-huh (affirmative). And once you have
22 that information -- I mean, obviously it's not New
23 Century Foundation that's calling the park rangers and
24 saying, hey come out. That would be your department;
25 correct?

1 A. We work in conjunction with New Century
2 Foundation relative to their event and the security
3 measures that need to be put in place to ensure their
4 safety for the event. We've sit at the table with
5 Mr. Taylor in discussions about how we're going to
6 ensure the conference attendees' safety and what do we
7 need to do to implement measures associated with that.

8 Q. Sure. I understand that. I think
9 everybody in the room understands that. Let me try it
10 another way. Who has the authority to say, let's get
11 10 extra law enforcement officers out here? Would
12 that be your department?

13 A. I have the authority, as the director of
14 operations for Tennessee State Parks, to determine
15 what state park resources can be utilized to support
16 an event. I can reach out through my commissioner's
17 office to ask for additional assistance from other
18 state agencies, and it's up to those state agencies to
19 determine what resources they can allocate to help
20 assist with that event.

21 Q. Okay. And you obviously are a State
22 employee; correct?

23 A. Yes, sir.

24 Q. Now, you used the term -- this is -- this
25 area that is being reserved, it includes an inn and

1 also the conference center at that inn; correct?

2 A. Yes.

3 Q. And that's what you're referring it as
4 several times, correct, as the conference center?

5 A. Inn and conference center, yes.

6 Q. Okay. And how many years ago was the
7 conference center made available to the public?

8 A. Before I started working with Tennessee
9 State Parks there's been an inn at Montgomery Bell, so
10 over 30 years or more.

11 Q. Okay.

12 A. I think the initial inn was in the late
13 '40s or early '50s.

14 Q. And can anybody rent the conference
15 center?

16 A. Yes.

17 Q. All right. And, in fact, lots of
18 different groups have used the conference center, I
19 would assume; is that right?

20 A. Yes.

21 Q. All right. And if someone rents the
22 conference center, they can allow the general public
23 in free of charge if they wanted to; correct?

24 A. Yes.

25 Q. All right.

1 A. Yes. I mean, it's their decision on who
2 comes into the areas that they rent, yes. Yeah.

3 Q. And there's no restrictions on what they
4 can talk about; right?

5 A. That's correct.

6 Q. Right. Now, the American Freedom Party
7 had an event in May of this year; correct?

8 A. Yes, they did.

9 Q. And -- you recall that?

10 A. Yes.

11 Q. And the American Freedom Party signed the
12 new contract; correct?

13 A. They signed -- yes, a newer version of
14 the contract, yes.

15 Q. That would be the contract that's under
16 dispute today; correct?

17 A. Yes.

18 Q. And that contract basically has
19 open-ended costs for security for the guests -- or for
20 the person who rents the facility?

21 A. Cost recovery, yes.

22 Q. Okay. And the American Freedom Party was
23 assessed -- well, let me back up. You may not
24 remember, but do you recall a general ballpark amount
25 of how much American Freedom Party paid for the rooms

1 and the inn and the food and all that?

2 THE COURT: Can we hold on just a minute?
3 Is the American Freedom Party Mr. Tyler's
4 organization?

5 MR. IRION: Yes, Your Honor.

6 THE COURT: And you have filed an
7 affidavit in the record, which is 13-2, and you've
8 attached the contract that he signed. And I've looked
9 at that contract. It is not the same contract.
10 It's -- it doesn't have this provision in it. At
11 least what's in my court file as the contract
12 attached.

13 MR. IRION: It's not the form contract,
14 but can I ask the witness a question about -- and
15 maybe clarify this, Your Honor?

16 THE COURT: Sure.

17 BY MR. IRION:

18 Q. The policy that is at issue regarding the
19 open-ended recovery of security costs was in place
20 when the American Freedom Party held their event,
21 correct, in May?

22 A. Yes, it was.

23 Q. Okay. And now the American Freedom Party
24 actually --

25 MR. IRION: May I show the witness,

1 Your Honor, the contract that the American Freedom
2 Party used in May?

3 THE COURT: Sure.

4 BY MR. IRION:

5 Q. I'll just show you the contract. It's
6 already in evidence.

7 A. This was handled at the park
8 specifically, but I'm aware of the contract, yes.

9 Q. All right. And what was the total amount
10 that the American Freedom Party paid for the use of
11 the facilities and the associated costs initially?

12 THE COURT: Is that the 32,000 figure?
13 Anticipated room, catering, all that?

14 MR. IRION: Your Honor might be looking
15 at the other contract, which was the New Century
16 Foundation contract.

17 THE WITNESS: It's 22,606.

18 MR. IRION: That sounds correct.

19 THE COURT: Okay. I think you filed the
20 wrong contract, but that's okay. How much was it,
21 22,000 what?

22 THE WITNESS: 606.

23 BY MR. IRION:

24 Q. And that was for the rooms and the
25 conference center; correct?

1 A. That is for the rooms and the suites.

2 Q. And that also included some food catering
3 and some other services; correct?

4 A. There's an additional 3,374 for meeting
5 space that was included in that contract. Total room
6 and meeting charges were 24,857. Additional charges
7 associated with food and beverage and catering was
8 \$7,263 for a total of \$32,120 and some change.

9 Q. Now, did the American Freedom Party
10 guests cause any damage to the facilities at that
11 event?

12 A. No.

13 Q. No?

14 A. No.

15 Q. They were assessed a \$21,000 fee
16 assessment afterward; correct?

17 A. Yes.

18 Q. And that was in addition to the 22,000
19 plus that they paid for the rooms; correct?

20 A. Yes.

21 Q. So that was for security; correct?

22 A. Associated with their event, yes.

23 Q. Yes. And that was -- those security fees
24 were assessed because of the protests that occurred at
25 their event; correct?

1 A. It was assessed due to the additional
2 staff and resources that had to be brought in to
3 support that event, associated with the activities
4 that were happening as a result of the event, yes.

5 Q. In other words, the protesters being
6 there caused those additional costs; correct?

7 A. That intel helped -- the intel associated
8 with protesters coming in to ensure the safety of our
9 conference attendees and the safety of our staff that
10 worked that event resulted in us needing to bring in
11 additional resources to ensure that the event went off
12 as -- as we had planned.

13 Q. Sure. So if there hadn't been any
14 protesters, the additional security wouldn't have been
15 necessary; correct?

16 A. In our discussions with Mr. -- this is
17 the American Freedom and that's Rick Tyler. He
18 indicated in our discussions with him he wanted the
19 same security that we provided for the American
20 Renaissance Conference. These are the same measures
21 that we put in place associated with that conference.

22 Q. Okay. That's great. However, my
23 question was: If protesters hadn't showed up, the
24 assessment would have been less; correct?

25 A. We would assess based off of the intel of

1 the event and what kind of measures were needed, yes.

2 Q. All right.

3 THE COURT: Did Mr. Tyler request
4 security?

5 THE WITNESS: He indicated that he wanted
6 the same security measures that we had implemented for
7 the American Renaissance Conference or the New Century
8 Foundation Conference that he attended. And he was
9 aware of the security measures that we had put in
10 place relative to that conference.

11 THE COURT: Because he wanted everybody
12 to be safe.

13 THE WITNESS: Yes.

14 BY MR. IRION:

15 Q. Sure. And if he hadn't requested that
16 security, would you have had absolutely no officers in
17 the area that day or those days?

18 A. No, we would still have officers in the
19 area that are associated with the normal operations of
20 the inn and conference center.

21 Q. Sure.

22 A. And so these are charges associated with
23 the additional resources that we had to bring in.

24 Q. Sure. And if Mr. Tyler hadn't asked for
25 additional resources but protesters showed up and

1 started causing problems, you would still have brought
2 in additional law enforcement to take care of that;
3 correct?

4 A. Depending on the intel that we received,
5 we'd brought in the additional resources needed to be
6 able to respond to those.

7 Q. Sure. Your attorney asked you a lot of
8 hypothetical questions and I didn't object because you
9 know about -- you're the one that makes these
10 decisions.

11 A. Sure.

12 Q. Let me give you a hypothetical. American
13 Century Foundation says we don't need any security,
14 but a thousand protesters show up and they're looking
15 like they're going to burn the place down. What are
16 you going to do?

17 A. We're going to respond to that as we need
18 to --

19 Q. Sure.

20 A. -- to ensure public safety.

21 Q. Regardless of whether or not American
22 Freedom asked for security; correct?

23 A. And they're going to get five rangers
24 that show up because that's all we would have
25 available at that time to respond to that event.

1 Q. You wouldn't call in extras if there was
2 a riot?

3 A. We would try to, but it would be -- it'd
4 take time. We are across the state of Tennessee.
5 We're not next door.

6 Q. Sure. But I'm not asking about the time.
7 I'm trying to establish a fact that you wouldn't not
8 call in extra security simply because they didn't ask
9 for it; right? You'd call in security if there was a
10 protest riot; correct?

11 A. We would call in additional resources for
12 local other agencies and other law enforcement because
13 we wouldn't be able to respond in time based off of
14 that.

15 Q. Sure. And you would call in additional
16 rangers as well; correct?

17 A. Only if we had them available to come in
18 that direction.

19 Q. Sure. So with that caveat, assuming
20 they're available, you would call them in; right?

21 A. We would try to respond as best we could
22 to the situation.

23 Q. That would cost extra money that would be
24 assessed to American Freedom Party in this
25 hypothetical; right?

1 A. We would have to look at that particular
2 situation to determine what we know of in advance,
3 relative to the conference and whether those -- where
4 those expenses should apply.

5 Q. Okay.

6 A. It wouldn't be a guarantee that it would
7 be applied to any event holder for those additional
8 charges. But if we have intel associated with an
9 event in advance of known cost associated with that
10 and known resources that have to be brought in to
11 support that event, we should seek our ability to
12 recover some of those costs.

13 Q. Okay.

14 A. Those are knowns.

15 Q. Sure.

16 A. You're talking about unknowns.

17 Q. Right. And in this hypothetical, which I
18 think has gone a little bit out -- your answer's kind
19 of thrown out some more hypothetical situations, but
20 at the end of the day whether or not to call in more
21 rangers would be your decision or someone in your
22 department's decision; correct?

23 A. Yes.

24 Q. All right. Have any other groups been
25 assessed a 20,000-plus-dollar law enforcement

1 assessment after an event?

2 A. We have assessed other groups
3 considerable charges for cost recovery associated with
4 events, things that include security measures that we
5 provided, damage charges associated with their events
6 that we recouped those costs from. Examples of that
7 would be the Food and Music Festival at the
8 Bicentennial Mall, the New Year's Eve event at the
9 Bicentennial Mall. And then other smaller, you know,
10 measures across the state that we've dealt with.

11 Q. But you've already testified that all of
12 those additional things like catering is included in
13 the first bill and that New Century Foundation didn't
14 cause any damages in the past. So what I'm asking you
15 is: Have there been any other groups who have had
16 over \$20,000 assessed to them for security fees?

17 A. So far relative in Tennessee State Parks
18 we haven't had groups that have required as much
19 security measures associated with their events as we
20 have with New Century Foundation or the American
21 Freedom Party.

22 Q. Okay, that's fair. I just need to
23 establish the answers to these questions for the
24 Court. That's all.

25 Is the conference center still available

1 for rental for next May?

2 A. I'd have to go check the availability.

3 Q. Okay. But it could be rented out in
4 whole today or tomorrow?

5 A. If it's available, it could be rented
6 out, yes.

7 Q. So because New Century hasn't signed the
8 new contract, they could lose the ability to have
9 their scheduled event; correct?

10 A. We would work with them on any time
11 that's available for them to be able to hold a
12 conference at our facility.

13 Q. Okay. Now, your attorneys in their
14 response to New Century's motion for preliminary
15 injunction asserted -- and I believe you testified
16 about this as well -- that damage caused by parties
17 other than the people who rented the facilities would
18 not be assessed to the people who rented the
19 facilities; correct?

20 A. The damages would be assessed to those
21 that caused the damage.

22 Q. Okay. How would you know who caused the
23 damage?

24 A. If we couldn't verify who caused the
25 damage, we wouldn't charge those against anybody.

1 Q. Okay. Now, I noticed in your testimony
2 and in your affidavit you specifically made the
3 distinction between damages assessments and law
4 enforcement assessments. Now, isn't it true that
5 whoever caused or whatever causes the need for extra
6 law enforcement, the group organizing the event would
7 be assessed the cost of the additional law
8 enforcement; is that correct?

9 A. I'm trying to understand exactly what
10 you're asking, but that -- that would be a
11 case-by-case and an understanding of how the law
12 enforcement was being used on what would be assessed.

13 Q. All right. Well, you've testified
14 several times that more protesters show up for an
15 event, you need more law enforcement that costs money,
16 you're going to assess the event organizers for that;
17 correct?

18 A. Still trying to understand exactly --
19 how -- relative to state park resources associated
20 with help to help facilitate the event, we would look
21 at those resources and costs associated with that, and
22 we would charge those fees associated to help that
23 event occur as cost recovery associated with the
24 event.

25 Q. Okay.

1 A. Now, we pulled in law enforcement
2 resources from across the state and we did not bill
3 anybody for additional law enforcement resources to
4 help accommodate the concerns relative to additional
5 protests coming in and those type of things.

6 THE COURT: You didn't charge for Highway
7 Patrol, Department of Corrections?

8 THE WITNESS: Right.

9 THE COURT: All these other agencies --

10 THE WITNESS: Right.

11 THE COURT: -- TBI.

12 BY MR. IRION:

13 Q. But you did charge for additional law
14 enforcement -- or, excuse me, rangers?

15 A. Yes.

16 Q. And they are POST certified law
17 enforcement?

18 A. Yes.

19 Q. Okay. And --

20 A. I guess that's where it --

21 Q. My question, then --

22 MS. JORDAN: Your Honor, may he finish
23 the answer?

24 THE COURT: Let him finish.

25 THE WITNESS: When you say law

1 enforcement or security measures, that includes
2 everybody. So I was trying to understand what you
3 were asking specifically.

4 BY MR. IRION:

5 Q. Okay. There was a \$21,000 bill for
6 additional law enforcement.

7 A. Yup.

8 Q. That was for the rangers alone; correct?

9 A. That was for three days of 24-hour
10 support for that event.

11 Q. And those rangers were brought in because
12 of the activities of the protesters, not the members
13 of the American -- guests of the American Freedom
14 Party; correct?

15 A. Brought in to support the event and
16 ensure the safety of those attending the conference
17 and our park employees that were working the
18 conference.

19 Q. Okay. Is that a yes or a no? This is a
20 yes-or-no question.

21 A. Well --

22 THE COURT: I think it's a legal
23 conclusion. It's a legal conclusion.

24 MR. IRION: I'll move on.

25 THE COURT: Move on to something else.

1 MR. IRION: I'll move on. I apologize.

2 BY MR. IRION:

3 Q. So what started this whole line of
4 questioning was my wanting to clarify your testimony
5 and your affidavit where you tell the Court that costs
6 associated with the activities of other people, not
7 the organizers of an event, would not be assessed.
8 That is not inclusive of additional law enforcement;
9 correct?

10 THE COURT: You mean that just with
11 regard to damages to property.

12 THE WITNESS: Damages, yeah. I mean, we
13 wouldn't charge anybody for the damages associated --
14 created by somebody else. But if we needed to bring
15 in additional resources to ensure that an event
16 happens as the people that rent our facility expect it
17 to happen, to have security and protection against
18 whatever factors that are out there to ensure the
19 safety of our employees that are working that event,
20 we would bring in the resources necessary to ensure
21 that event goes off as planned and as expected by the
22 person -- you know, the people that were working
23 there.

24 BY MR. IRION:

25 Q. And would charge the event organizers for

1 that; correct?

2 A. It's associated with the event that's
3 being held.

4 Q. Simply -- can you answer the question,
5 please? I'm simply saying: And you would charge
6 them; correct?

7 A. We would assess a fair charge associated
8 with that event, yes.

9 Q. I'm simply trying to make clear for the
10 Court that the assertions that activities of other
11 people aren't assessed to the organizers is simply not
12 true in the case of law enforcement needed for
13 protesters, which are not members of the organization?

14 THE COURT: That's argument, Mr. Irion.
15 That's argument.

16 MR. IRION: I apologize.

17 THE WITNESS: From the standpoint if we
18 had a birthday party and they needed additional
19 resources available to them, they would be charged
20 those -- the costs associated with those additional
21 resources.

22 So if the papp- -- the media and all that
23 wanted to come and take pictures of some celebrity
24 that was holding an event in our park and we needed
25 additional resources to ensure the security of that

1 event, that would be charged to recover the costs
2 associated with the people holding that event.

3 BY MR. IRION:

4 Q. After you decided that those additional
5 resources were necessary --

6 A. Yes.

7 Q. -- under the circumstances?

8 A. Yes.

9 MR. IRION: Okay. I believe I'm almost
10 done.

11 I believe that's all I have, Your Honor.

12 THE COURT: Okay. Any redirect?

13 MS. JORDAN: No, Your Honor.

14 THE COURT: Mr. Robertson, I want to talk
15 about the Bicentennial New Year's Eve party -- and I
16 realize that the last one, your new contract wasn't
17 formally in place for that, but who books the
18 Bicentennial Mall for that party?

19 THE WITNESS: It's the --

20 THE COURT: Is it a radio station?

21 THE WITNESS: No, it's the Nashville
22 Convention and Events Group.

23 THE COURT: Okay. So it's the Nashville
24 Convention Center group that books the Bicentennial
25 Mall.

1 THE WITNESS: Yeah, they book it for the
2 New Year's Eve event.

3 THE COURT: Okay. So do you discuss with
4 them ahead of time how much security is going to be
5 needed?

6 THE WITNESS: They have a -- they have a
7 multiyear contract with us. So that's in the contract
8 negotiations associated with the event. So it's --
9 it's a little bit outside of that, but we also have
10 cost recovery language within those contracts, which
11 results in fees associated with additional security,
12 fees associated with damages or cost recovery language
13 associated with those.

14 THE COURT: Okay. And that would
15 reimburse only for park rangers --

16 THE WITNESS: Right.

17 THE COURT: -- and damages?

18 THE WITNESS: Right.

19 THE COURT: And they probably pay a lot
20 of Metro cops to be there.

21 THE WITNESS: Yeah. They pay some
22 additional security.

23 THE COURT: And if the ACLU decided that
24 they wanted to have a national conference at
25 Montgomery Bell State Park and they got word that some

1 Right Wing groups were going to protest their national
2 conference there, how would you handle that? What
3 would you do?

4 THE WITNESS: We would assess the
5 situation, determine if additional resources were
6 needed to come in to ensure their safety and we would
7 implement those measures. And any costs associated
8 with helping to carry out that event that were a
9 result of a cost to Tennessee State Parks, we would
10 seek reasonable measures of cost recovery from that.

11 THE COURT: And the -- the example given
12 by your counsel of a Taylor Swift birthday party, a
13 conference of the ACLU and the American -- the
14 plaintiff here, the New Century Foundation and the
15 American Freedom Party, are these discussions about
16 what security measures are necessary, are these
17 discussions that you always have or someone from your
18 department has with whoever's booking the space to
19 figure it out?

20 THE WITNESS: Yeah, we sit down with the
21 groups in advance and talk about what their intents --
22 criteria that we went through, we assess that with
23 them, talk about their event and determine what kind
24 of security measures are needed. And they agree upon
25 those measures and that's how we move forward.

1 THE COURT: Then you figure out where
2 those resources are coming from.

3 THE WITNESS: Right.

4 THE COURT: You figure out how many park
5 rangers you're going to devote and does highway patrol
6 have people available.

7 THE WITNESS: Yeah.

8 THE COURT: Your park rangers, what are
9 they doing in their home parks and whether they can
10 come.

11 THE WITNESS: Yeah.

12 THE COURT: And you do not assess any
13 amount of money in advance. This is all after the
14 fact that you -- I mean, you get the security deposit
15 of 10 percent.

16 THE WITNESS: Right.

17 THE COURT: Of whatever their fees are
18 going to be for the rooms and the catering and all
19 that?

20 THE WITNESS: That's correct.

21 THE COURT: That's the security deposit.

22 THE WITNESS: Yes.

23 THE COURT: And then you bill these --
24 after the fact you bill these charges against this
25 security deposit.

1 THE WITNESS: Yes.

2 THE COURT: And you might keep all of it
3 or some of it or none of it.

4 THE WITNESS: Right.

5 THE COURT: And you also might have to
6 bill more than that --

7 THE WITNESS: Right.

8 THE COURT: -- depending on the
9 situation.

10 THE WITNESS: Yes, ma'am.

11 THE COURT: And if somebody -- if you sat
12 down with an organization that wanted to do this and
13 they basically said we really don't want any security,
14 period paragraph, and it was your information from
15 other sources that they needed security, what would
16 happen?

17 THE WITNESS: We would talk with -- talk
18 with them about that and provide them our advice on
19 how they would want to look at providing that. If
20 they insisted that they didn't need any security, then
21 we would not provide any additional security.

22 THE COURT: So you would let them go
23 ahead and rent the space.

24 THE WITNESS: Yes.

25 THE COURT: And then if some terrible

1 thing happened, hopefully you would not be on the hook
2 because they told you they didn't want any security.

3 THE WITNESS: Well, we would definitely
4 document that they didn't want any security associated
5 with that. We would provide normal security. If we
6 felt the threat was significant enough that we want to
7 ensure the general public's safety and our staff
8 safety, we would implement what measures we need
9 that's appropriate to do that. But --

10 THE COURT: Okay.

11 THE WITNESS: -- I mean, we're going to
12 take safety over other things, but, you know, we would
13 weigh all that to determine how we want to respond to
14 the situation.

15 THE COURT: Okay. Anything else as a
16 result of my questions?

17 Okay, you may step down. Thank you.

18 *****WITNESS EXCUSED*****

19 THE COURT: Any other proof from the
20 State?

21 MS. JORDAN: No, Your Honor.

22 THE COURT: Do you wish to put anybody
23 on?

24 MR. IRION: No, Your Honor.

25 THE COURT: Okay, I'll hear argument.

1 MR. IRION: Your Honor, based on the
2 questions that the Court just asked, I want to clarify
3 the fact that the witness testified that the decision
4 to bring in additional law enforcement resources was
5 an assessment that would be made by the State
6 officials regardless of what the organizers asked for
7 or didn't ask for or said that they did or didn't
8 want.

9 At the end of the day he testified that
10 there's concern about the employees there, which is
11 natural, and that the function of the police officers
12 is to protect the public, and so that those resources
13 would be called in even if the organizers said we
14 don't want any law enforcement anywhere around this
15 event.

16 They're still going to be called in. And
17 the organizers are still going to be assessed. That
18 was his testimony over and over again. I think that's
19 an established fact.

20 Your Honor, the Supreme Court has said
21 that regulations that require subjective assessment of
22 a fee to cover -- and this is a quote, the cost of
23 necessary and reasonable protections of persons
24 participating in or observing said activity must
25 necessarily examine the content of the message that is

1 conveyed. The First Amendment prohibits the vesting
2 of such unbridled discretion in a government official.
3 This is from *Forsyth County versus Nationalist*
4 *Movement*, 505 US 123 at 134.

5 Your Honor, this is exactly what's
6 happening here. The protests that -- whether or not
7 protests happen requires an assessment of the content
8 of what's going to be discussed. Because whether or
9 not protests occur depends on how controversial or
10 perceived controversy there is in the content of
11 what's being discussed.

12 THE COURT: Well, it's really dependent
13 on the Internet, it looks like to me.

14 MR. IRION: Sure. Sure.

15 THE COURT: And how controversial, yes,
16 how controversial the group is, but it seems to me
17 that this whole issue has been wildly generated and
18 gotten much more serious because of the Internet.

19 And you can't tell me that if the ACLU
20 decided that they were going to have their conference
21 out there that there wouldn't be Right Wing groups
22 that would be generating Internet traffic to come out
23 there and protest against them too.

24 MR. IRION: I completely agree,
25 Your Honor. If a gay couple decided they wanted to

1 rent the facility for a wedding, there probably would
2 be protesters there too. And the couple would be
3 assessed the additional law enforcement that would be
4 required because of the protesters. And this is
5 basically -- I mean, they're trying to perform
6 their -- they're doing something that's protected by
7 the constitution.

8 And yet they're going to have to consider
9 the fact that if we do this here we might end up with
10 a \$300,000 bill. There's no cap. It's whatever the
11 State decides is necessary based on what other people
12 do in response to our doing an event that is
13 essentially free speech.

14 THE COURT: Is Taylor Swift's birthday
15 party, is that based upon the content of speech? I
16 don't think so.

17 MR. IRION: Your Honor, the event is --
18 excuse me, the assessment of how much law enforcement
19 is necessary is going to be a subjective decision of
20 some State official, right or wrong. They might be
21 completely right. They might have too little.

22 But the point is according to the Supreme
23 Court -- and there's more cases that I'll cover here
24 in a second -- this is absolutely on point something
25 that can never happen. You cannot have a government

1 official of any kind, no matter how honest they are,
2 deciding that, well, this event is going to cost more
3 because there's going to be a heckler's veto, there's
4 going to be protests showing up there. Or -- and this
5 event won't. Because it leaves the government
6 official with too much authority.

7 There's too much power there to say, I
8 don't like that so I'm going to charge more. I'm
9 going to bring in more off-duty rangers and cost that
10 organization more. I'm not saying that there's any
11 evidence that that happened here or it didn't happen.

12 We don't know at this point, but the
13 point is the Supreme Court has been very clear that
14 that's a heckler's veto. A heckler's veto is,
15 according to the Supreme Court, viewpoint
16 discrimination, not just content discrimination.

17 And they say that specifically because
18 the danger is too high of governmental abuse of
19 charging one type of discussion because they disagree
20 with it than another type of discussion. They simply
21 cannot have this type of an open-ended -- or for that
22 matter not open-ended.

23 There's case law that I'll cover here in
24 a second that specifically says it doesn't matter if
25 it's a \$100 fee. You simply cannot have a government

1 agent deciding, well, this group doesn't need to pay
2 the fee and this group does need to pay the fee.

3 THE COURT: You know what, *Forsyth* was
4 decided in 1992.

5 MR. IRION: Sure.

6 THE COURT: Really, before the Internet.

7 MR. IRION: Yes.

8 THE COURT: And so at that time it could
9 be that the only kind of events like this that you
10 would have demonstrations and hecklers and things were
11 political events.

12 MR. IRION: Sure.

13 THE COURT: Now we have Taylor Swift
14 birthday parties that generate publicity, Internet
15 traffic and, therefore, hecklers of a different kind.
16 And I'm wondering if, in this day and age, the
17 decision might be different because it's not just
18 political groups that might generate protesters, but
19 it's celebrities that generate kooks and fans that get
20 out of control.

21 MR. IRION: Your Honor, I have a Sixth
22 Circuit 2015 case, this is *Bible Believers*, happened
23 up in Michigan. It was a protest against Muslim, an
24 annual Muslim fair that was being held every year and
25 some Right Wing Bible-believing people went up there

1 and protested and they were attacked. And rather than
2 protect them, which by the Sixth Circuit said the
3 police department had an affirmative duty to protect
4 them, rather than stop their speech. But rather than
5 protecting them, they made them leave.

6 And a lawsuit was filed and the officers
7 and the department were found -- summary judgment
8 on -- against the defendants because the Sixth Circuit
9 said in these circumstances the only time you can shut
10 someone down -- someone's speech down because of the
11 protests of others is when the officer's life is in
12 danger.

13 And they also said specifically if
14 there's more resources that could be called in that
15 are readily available and they're not to protect those
16 speakers and keep them speaking, then they're still
17 violating the constitution. They have an affirmative
18 duty to protect unpopular speech. I mean, Your Honor,
19 we --

20 THE COURT: Well, that's what
21 Mr. Robertson said he's doing.

22 MR. IRION: Exactly, Your Honor.

23 THE COURT: He's not shutting down --
24 he's not refusing to rent to your clients.

25 MR. IRION: Yes.

1 THE COURT: He wants to provide them with
2 protection.

3 MR. IRION: Yes, Your Honor, but he wants
4 to charge \$20,000 in one instance already and it could
5 possibly go up there from, additional because of the
6 activities of other people. That is a heckler's veto.

7 And the Supreme Court has said about a
8 heckler's veto -- heckler's veto is viewpoint
9 discrimination. This is a *Police Department of*
10 *Chicago* 408 US at 98. The Sixth Circuit said in *Bible*
11 *Believers versus Wayne County*, there can be no
12 legitimate dispute based on the record that the police
13 officers effectuated a heckler's veto by cutting off
14 *Bible Believers* protected speech in response to a
15 hostile crowd reaction.

16 THE COURT: Now, I haven't read that case
17 yet. The police were not parties to this; right?

18 MR. IRION: Yes.

19 THE COURT: To this case?

20 MR. IRION: In *Bible Believers* the police
21 were the defendants.

22 THE COURT: They were the defendants.

23 MR. IRION: Yes.

24 THE COURT: But they shut down the
25 speech.

1 MR. IRION: Yes, Your Honor.

2 THE COURT: And -- and the Sixth Circuit
3 said they had the responsibility to provide safety and
4 not shut down the speech, is that what you're saying?

5 MR. IRION: That is part of the case,
6 Your Honor.

7 THE COURT: Does it say anything about
8 paying the police in that case?

9 MR. IRION: No, Your Honor, but I do have
10 a case from the Fifth Circuit that is dead-on point to
11 this case, and it's from 2010. This is *Sonnier v*
12 *Crain*, Your Honor. In that case we haven't -- I can't
13 believe I haven't gotten to discussion of forums
14 because obviously with free speech case, forum is
15 going to be an issue, but before -- and *Sonnier* talks
16 to that issue.

17 Before I even get to that, the *Sonnier*
18 case said that the university speech violates the
19 First Amendment because it gives the university sole
20 discretion in determining both the need for and the
21 strength of the security and assesses the cost of
22 additional security on the sponsoring individual or
23 organization. That's *Sonnier v. Crain*, 613 F.3d 436
24 at 447.

25 THE COURT: Is that in your brief? Is

1 that cited in your brief?

2 MR. IRION: I believe so. I can check if
3 you like.

4 THE WITNESS: That's okay.

5 MR. IRION: And the same court went on to
6 conclude, because of the unbridled -- because of the
7 unbridled discretion, the District Court abused its
8 discretion in denying a preliminary injunction with
9 regards to the security fee.

10 So, again, this is Fifth Circuit, but
11 it's almost exactly this situation. The government
12 agency, the university, was essentially saying, well,
13 if we need extra security, you have to pay for it.
14 And the Supreme Court in *Forsyth* said you can't do
15 that. The Fifth Circuit in 2010 said you still can't
16 do that. *Forsyth* hasn't been overruled.

17 And in *Bible Believers* the Sixth Circuit
18 said maintenance of the peace should not be achieved
19 at the expense of free speech. Again, discussing this
20 situation.

21 And just to get back to forum really
22 quickly so I don't completely miss a critical item,
23 Your Honor, in *Sonnier v Crain* the Fifth Circuit
24 applied *Forsyth* to a either public or designated
25 limited public forum. The defendants in their brief

1 clearly incorrectly repeatedly called this a nonpublic
2 forum. Well, nonpublic forum -- there's basically
3 three big categories. One is a public forum. At the
4 other end of the spectrum with lots of government
5 ability to censor is a nonpublic forum, and that
6 includes courthouses and post offices and, most
7 importantly, military bases.

8 These are places where the government has
9 never allowed free speech, and no one should have any
10 expectation of free speech. And so the government in
11 a nonpublic forum -- that's, you know, nonpublic
12 forum. It's a very short list.

13 In between public forum and nonpublic
14 forum is something that's called limited public forum
15 or designated public forum. The Fifth Circuit in
16 *Sonnier* essentially said limited or designated are
17 essentially the same thing.

18 And they went on to analyze the facts of
19 this case. They specifically said neither side argued
20 whether it was a public forum or a nonpublic forum,
21 but it doesn't matter here because you can't do these
22 things in either of those types of forums. And
23 designated forum which is a situation where the
24 government owns the property, but it has opened it up
25 to the public to allow speech --

1 THE COURT: That's what you think this
2 is.

3 MR. IRION: That's a designated forum.
4 The park is obviously a public forum. You could argue
5 that the conference center is a public forum. After
6 all, the conference center, the definition of
7 conference center in *Merriam-Webster* is something to
8 the effect of a group of people -- I've actually got
9 the exact quote, but it's basically a conference
10 center is a center where a group of people come
11 together to discuss matters of public importance and
12 controversy.

13 They call it a conference center. It's
14 open to the public. Anybody can rent it and they can
15 allow anybody in. And they specifically are there to
16 talk about political subject matter. So I would argue
17 it's a public forum. Even if it's not a public forum,
18 it is, at worst, a designated public forum because it
19 is owned by the government.

20 But the government long ago, according to
21 the testimony, decided that the public can come in and
22 they can talk about whatever they want. He
23 specifically said there's no restrictions on what
24 anybody can talk about and anybody can come. So it's
25 a designated public forum at worst. And *Sonnier*

1 clearly said doesn't matter here because content
2 discrimination and viewpoint discrimination cannot
3 happen. A subjective fee based on the content of the
4 speech is not only content discrimination, it is
5 viewpoint discrimination and it can't be done and they
6 cited *Forsyth* on that. Which, like I said, was
7 essentially the case that said you simply can't do
8 what the State of Tennessee is doing right now.

9 The State also mentioned that there's no
10 irreparable harm. They ironically cite *Elrod v Burns*,
11 which is a United States Supreme Court case from 1976.
12 It actually stands for the point that a denial of free
13 speech for even a short period of time, any period of
14 time, is absolutely irreparable harm without
15 exception.

16 It also says that injury not compensable
17 by money damages, denying speech, where the nature of
18 the loss made damages difficult to calculate is not
19 compensable in damages. So, again, we're talking
20 about something that has to be decided in equity.
21 Essentially you have to -- if, indeed, the policy is
22 violating the constitution, the only remedy is
23 allowing the speech to happen. And --

24 THE COURT: Well, you're not really
25 talking about preventing the speech from happening.

1 You're talking about burdening the speech. Isn't that
2 what you're talking about?

3 MR. IRION: Yes, Your Honor. And
4 obviously 20,000 -- I'm not going to rent a place
5 where the last group that was talking about the same
6 thing I was talking about got an additional \$20,000
7 assessed to them. No one is. And there's no limit.

8 I mean, \$200 million, \$20 million,
9 there's really no -- they can call in the National
10 Guard and assess it to my clients. It is just --
11 there's just -- there's no way you can justify this
12 under *Forsyth* and *Sonnier* and *Bible Believers*,
13 Your Honor. Thank you.

14 I know I've probably rambled a bit. Do
15 you have any questions for me, Your Honor?

16 THE COURT: No. Thank you.

17 MR. IRION: Thank you very much.

18 THE COURT: Let me hear from the
19 defendant.

20 MS. JORDAN: Thank you, Your Honor.
21 Plaintiffs have not met their burden to show that they
22 are entitled to having this Court force the State to
23 contract with them on their own terms.

24 The fallacy of plaintiff's view is that
25 the inn and conference center, it's not a public forum

1 of any kind. The inn and conference center are
2 commercial enterprises reservable for private
3 meetings, and New Century Foundation seeks to reserve
4 them as such. They are revenue-generating venues,
5 commercial venues that by statute, according to
6 Mr. Robertson, must be self-sustaining.

7 As such it is reasonable for Tennessee
8 Department of Environment and Conservation to
9 institute cost recovery procedures such as this so
10 that the inn and conference center, which are
11 commercial enterprises can continue to be
12 self-sustaining.

13 There has been no evidence of any
14 viewpoint discrimination at all. Mr. Robertson
15 testified that these assessments are made for any
16 group, including a Taylor Swift concert, a large --
17 any large group that has 250 to 300 attendees, which
18 is similar to the New Century Foundation.

19 And also, Mr. Robertson testified for
20 this particular event, they sit down at the table and
21 they discuss what kind of security measures are going
22 to be provided for this event.

23 The Supreme Court in *Lehman versus City*
24 *of Shaker Heights* found that the use of advertising
25 spaces on public buses was a commercial enterprise and

1 was inconsistent with an intent to designate the car
2 cards, which is where the advertisement is placed as a
3 public forum.

4 The Supreme Court in *Cornelius* also noted
5 that the use of property as a commercial enterprise,
6 like the inn and conference center, is inconsistent
7 with the concept of a public forum. And then we cite
8 the other cases in our brief of the *Atlanta*
9 *Constitution* case, the *Krishna* case, the *Chicago Acorn*
10 case.

11 I want to point out that plaintiffs
12 incorrectly defined public in their analysis. In
13 their brief they seem to say that the forum is the
14 park, which is a public forum. That's not entirely
15 accurate. The forum here is the inn and the
16 conference center, which are commercial enterprises
17 which must be self-sustaining.

18 The decision in *Cornelius* supports this
19 argument. In that case the Court stated, and I'm
20 quoting, In defining the forum we have focused on the
21 access sought by the speaker. When speakers seek
22 general access to public property, the forum
23 encompasses that property. In cases where limited
24 access is sought, our cases have taken a more tailored
25 approach to ascertaining the perimeters of a forum

1 within the confines of the government property.

2 And in *Cornelius* the Court found that the
3 forum at issue was a charity drive and not the federal
4 workplace because the speakers wanted only to access
5 the charity drive and not engage in face-to-face
6 conversation with the federal workers at workplace.

7 And it was -- it was deemed to be a
8 noncommercial -- a nonpublic forum, excuse me. Here
9 New Century Foundation seeks to hold their private
10 meeting -- and it is private -- at the inn and
11 conference center and wish to exclude everyone else
12 except for those people they want to allow in. The
13 forum is not the park, it is the inn and conference
14 center.

15 And they also say in their brief that
16 because the public can rent rooms, that must mean it
17 is a public forum. But that position defies common
18 sense here.

19 True, the public can rent the rooms at
20 the inn and the conference center, but once they do --
21 and Mr. Robertson testified to this -- those rooms
22 that are rented are only accessible by the reserving
23 party and the people they decide to allow into the --
24 into the facilities.

25 The rooms are not open by the public at

1 all times like streets and sidewalks, that kind of
2 thing. They are only open to reservation by
3 individuals and groups who then decides who gains
4 access to the facilities that have been rented.

5 THE COURT: Plaintiff's counsel makes the
6 point that this would be a open forum, public forum --
7 this is a public forum because a group could rent the
8 whole inn and conference center and make it open to
9 the public. I mean, that's not what they do, but
10 somebody could do that and could open it to the
11 public, there would be no restrictive -- no
12 restrictive access. So what's your argument,
13 counter-argument to that?

14 MS. JORDAN: And that would be a decision
15 for the reserving party, but we'll get to the *Chicago*
16 *Acorn* case. In that case the Court said -- the
17 government did not intend for these spaces to be used
18 for the purposes of public expression. And the spaces
19 were not open to the general public even though they
20 are sites usable and sometimes used for discussion and
21 other expressive activities.

22 So even in cases where maybe a reserving
23 party may open it to a public, that does not turn that
24 forum into a public forum for that one -- for that --
25 you know, for all time. It is -- maybe for that one

1 event --

2 THE COURT: So you determine what kind of
3 a forum it is in a general way, not based upon the --
4 not individual usage, is that what you're saying?

5 MS. JORDAN: Yes, Your Honor. It is
6 based on in a general sense, but -- but the inn and
7 conference center again are commercial enterprises.
8 We liken it to the airport terminal, to the news rack
9 in the *Atlanta Constitution* case, and to the Navy peer
10 in the *Chicago Acorn* case.

11 And the *Chicago Acorn* case is probably
12 the closest case on point there that there was -- that
13 that facility was rented for the Democratic National
14 Convention -- or Democratic convention and still it
15 was deemed to be a nonpublic forum. Just because
16 there was that one event there and public was allowed
17 did not turn that into a public forum.

18 And in particular here what we're looking
19 at is a commercial -- this is a commercial facility,
20 which by statute must be self-sustainable. That's
21 what Mr. Robertson testified to. That's the statute.

22 THE COURT: Yeah, but you've got a little
23 tension here. You've got a Tennessee statute that
24 requires that the Parks Department be self-sustaining,
25 but if a Tennessee statute in requiring that makes the

1 Parks Department violate the First Amendment, seems to
2 me that the Tennessee statute goes the way of the dodo
3 bird.

4 MS. JORDAN: And that would be true,
5 Your Honor, but we were saying that that's not the
6 case here. That is not violating the constitution,
7 but I would agree with that, Your Honor. It would
8 not -- the federal rights would overcome the state
9 statute. I agree with that, but that's not -- we, of
10 course, are arguing that's not what is happening here.

11 And then going back to in their brief the
12 plaintiffs indicate that because the public can rent
13 rooms, they must mean it's a public forum. The rooms
14 are not open. They're only open to reservation, but
15 this is part of the commercial enterprise. And plus
16 these places are, in fact, public forums.

17 As the plaintiff suggests, because the
18 public -- because the public can rent out these
19 spaces. Then that would mean the defendant would not
20 be able to keep out the protesters. They can separate
21 the protesters from -- from the event, from the
22 speakers, but they would have to allow the protesters
23 in if this is, in fact, a public forum as the
24 plaintiff suggests.

25 Taken to its logical extreme, someone

1 could enter a hotel room, which the plaintiffs are
2 suggesting is a public forum because the public can
3 rent it, and they can enter that hotel room and
4 express their views to whoever has rented that room.
5 That's just taken to its logical extreme.

6 Getting back to the fact that these are
7 commercial enterprises, they're revenue-generating
8 properties. It's inconsistent with the idea that
9 these are public forums. But that's, of course, not
10 what the plaintiffs want. They made it very clear.
11 They want to have their cake and eat it too.

12 They want to have a private, nonpublic
13 forum to the extent that they can have it all to
14 themselves, exclude members of the public, exclude
15 everybody, but then have it treated as a public forum
16 when it suits their purposes. It just does not work
17 that way.

18 In fact, in their -- in their motion, the
19 brief in support of the motion, they indicate that if
20 we don't -- don't provide the proper security, then
21 some member of the public can illicitly gain access to
22 the forum. So they want it private, they want -- they
23 want to exclude members of the public.

24 The emails from Mr. Taylor indicate that
25 New Century Foundation understands that the excess

1 staff are there for their protection. If I may get --
2 I think the -- I think Exhibit 4 -- and do you have
3 all of the exhibits?

4 COURTROOM DEPUTY: I don't.

5 THE COURT: We have no Exhibit 1, is that
6 what you said?

7 COURTROOM DEPUTY: I don't have an
8 Exhibit 1.

9 THE COURT: Oh, the affidavit of
10 Mr. Robertson, I think.

11 MS. JORDAN: It was up here. Yes.

12 THE COURT: Stealing exhibits.

13 MR. IRION: Sorry.

14 MS. JORDAN: I'm sure he didn't --

15 THE COURT: Those Knoxville lawyers.

16 MS. JORDAN: That's right.

17 This is a May 1 -- thank you. The May 1,
18 2018, email. And I'll see if I can do this, but what
19 Mr. Taylor is saying here is that he wants to thank
20 the park service for the thorough courteous and very
21 professional service of your men. Everyone I spoke to
22 at the conference was grateful for the protection you
23 provided to us. And they had a successful worry-free
24 conference in spite of the fears that they had.

25 And similar language was in the May 3

1 email. I'll just read it, I don't need to put it up
2 there because that's just causing too much trouble. I
3 wish I could convey my gratitude directly, but I
4 appreciate your letting people know how much we
5 appreciate the measures the State of Tennessee took to
6 ensure that we had a safe and productive conference.

7 So Mr. Taylor understands, particularly
8 since he is in conference with Mr. Robertson about the
9 event and the security for the event, that these
10 measures are taken for this event for them, for New
11 Century Foundation.

12 The idea that the heckler's veto, as
13 Your Honor pointed out, it's -- it's not just
14 political groups now. It's celebrities, it's other
15 things. It's not based on speech. If it is a
16 heckler's veto, then we're heckling everybody, no
17 matter what it is, whether it be the -- as I
18 described -- Taylor Swift birthday party is a great
19 example, but the elder -- the euchre -- I don't want
20 to say elderly because Ms. Ohlman plays euchre and
21 she's still in her 20s, and since she's pretty good at
22 it --

23 THE COURT: You can talk about the
24 Sweet Adelines, perhaps.

25 MS. JORDAN: There you go. Yes, there

1 you go. There you go. But the euchre tournament,
2 24/7, they play through the night, ESPN is there.
3 There's publicity. Who knows, maybe there's a famous
4 euchre player, I don't know, but that would create the
5 same kind of issues -- not the same, but very similar
6 issues to New Century Foundation.

7 The cost recovery measures apply to
8 everyone and they are just simply in place to ensure
9 that the inn and conference center can be
10 self-sustaining. They are commercial
11 revenue-generating enterprises.

12 Now, the cases that Mr. Irion was just
13 citing are inapposite. *Forsythe County* and *Sonnier*,
14 which is in his brief --

15 THE COURT: Okay, good.

16 MS. JORDAN: -- by the way.

17 THE COURT: I haven't been able to read
18 the cases as I would have wanted to. You know, we're
19 short a judge and we have no senior judges and we're
20 dying over here. Anyway, go ahead.

21 MS. JORDAN: I know. And maybe
22 Mr. Robertson can help. He's been a great help. But
23 in both of those cases they involved issues of
24 unbridled discretion involved in the permitting body
25 to charge fees in advance of the event. And here, as

1 Michael Robertson testified, and quite extensively,
2 there are criteria that are applied to each
3 reservation to determine whether there would be or may
4 be excessive costs.

5 And the Sixth Circuit in *Stonewall Union*
6 *versus City of Columbus* -- and that is in our brief --
7 found that because there were criteria, even if there
8 has to be use of some discretion within those
9 criteria, there was not unbridled discretion.

10 Also in *Forsyth County and Sonnier*, as I
11 was alluding to, the charges were costs that had to be
12 paid up front and here that is not the case. The
13 charges are not levied until after the event.
14 Your Honor alluded to that. And the charges that are
15 actually given to the reserving party are those that
16 are actually incurred.

17 And Mr. Robertson testified if the
18 response to the event turns out not to be as big as
19 anticipated, then some of the staff will stand down
20 and they will not be charged for that event.

21 Now, the *Bible Believers* case is
22 inapposite because that involved issues of failing to
23 protect the *Bible Believers* who were trying to speak
24 in the middle of an Arab festival, but they were being
25 pelted with bottles and other materials.

1 But that's not what's happening here. To
2 the contrary, we are and have always provided
3 protection to New Century Foundation. So that
4 really -- that case does not apply here.

5 Plaintiffs assume that they are the only
6 group that would require additional staffing and law
7 enforcement, but we discussed that. That's just not
8 the case. So it's not a speech tax. That is based on
9 the controversial nature of New Century Foundation's
10 speech. It is simply intended to be a cost recovery
11 measure for costs associated with any groups -- any
12 groups's use of the facilities.

13 And that's part of the recognition that
14 these facilities are mandated to be self-sustaining
15 and are commercial enterprises. Taking -- setting
16 aside the State statute would come, you know,
17 secondary to any First Amendment freedoms. These cost
18 recovery measures are what helps to keep these
19 facilities self-sustaining.

20 And the fact that as Mr. Robertson
21 testified that the Department of Environment and
22 Conservation only charges for the actual park staff
23 for purposes of making sure the event is a success,
24 not the TBI, not the troopers, not the helicopters,
25 not the TWRA, all of that, proves that this is simply

1 a cost recovery measure for the commercial enterprise.
2 And it's not designed to burden plaintiffs with costs
3 associated with the State's management of the
4 protesters.

5 And my -- Mr. Robertson testified that
6 those costs, the troopers, the TBI and so forth, is
7 the State's response, not the response of the inn and
8 conference center. The costs of the park staff is for
9 the event and is a cost recovery measure for the
10 commercial enterprise.

11 And plaintiffs are wrong, there is no
12 charge for damages caused by the protesters. The
13 damage -- it would be only the damage, if any, that
14 New Century Foundation causes. The inn and conference
15 center for private meetings, the public is not allowed
16 unless the group that reserves it allows the public
17 in. We talked about that.

18 The staff at the inn and conference
19 center help to ensure the safety of the group and, of
20 course, the safety of the inn and its staff. And they
21 will eject people if so requested. And as
22 Mr. Robertson testified, that has happened with New
23 Century Foundation. New Century Foundation has asked
24 that some people be escorted out.

25 It's a nonpublic forum. That's -- it's

1 just -- it's just a nonpublic forum. As such, all
2 that must be shown is that the contract along with the
3 security deposit and the cost recovery measures are
4 content neutral and reasonable. The provisions apply
5 to everyone.

6 So they're content neutral and they are
7 reasonable to the commercial enterprise. It is not
8 unusual in any respect for a hotel and conference
9 center to expect their attendees to pay for costs
10 associated with their event. So plaintiffs cannot
11 show likelihood of success on the merits.

12 I want to briefly address the irreparable
13 harm without legal remedy. That's not the case at
14 all. The proposed conference is for May 17, 2019,
15 more than seven months away. There's no present
16 imminent danger of plaintiffs being unable to reserve
17 the inn and conference center.

18 THE COURT: Well, but he said if somebody
19 showed up and wanted to rent it before these people
20 signed the contract, they would rent it to somebody
21 else. He said that.

22 MS. JORDAN: He did. He did. In his
23 affidavit, though, what -- what he points out -- and I
24 didn't bring it out again because I didn't want to be
25 duplicative. Mr. Robertson testified in his

1 deposition, they can cancel any reservation for rooms
2 at the inn and conference center at any time before
3 the reserving party would incur any cancellation
4 costs. So they can still change the reservations if
5 they need to do so.

6 THE COURT: So if other people have
7 booked some of the rooms, you're saying they can
8 cancel those rooms and give it to the plaintiff.

9 MS. JORDAN: Correct.

10 THE COURT: Okay.

11 MS. JORDAN: Yes, Your Honor. Yes.

12 THE COURT: All right.

13 MS. JORDAN: All that's happened so far
14 is that plaintiffs have been presented with the
15 contract that contains provisions that every group
16 must agree to regardless of the purpose, the size,
17 whatever, every group has to agree to it. And the
18 security deposit is the same. It's 10 percent.

19 And there is a potential for a legal
20 remedy, money damages if there is an issue. The
21 amounts for security damage are assessed after the
22 event is over.

23 At that time if plaintiffs believe that
24 they are entitled to a refund of their security
25 deposit, then they can file a lawsuit for money

1 damages for a refund. If they are charged additional
2 amounts for excessive security and damages over and
3 above the security deposit after the event, they can
4 just not pay those or file a lawsuit based on that.

5 There would be substantial harm to the
6 State. Plaintiffs in their motion and in their
7 complaint specifically seek to rent the inn and
8 conference center on their own terms and ask this
9 Court to compel the State to enter into that contract.

10 That's not relief that this Court can
11 compel. This Court cannot compel a contract. And
12 compelling the State to enter into a contract on the
13 plaintiff's terms would mean that the facilities would
14 not be self-sustaining necessarily.

15 Further, and I might point out, even if
16 this Court were to find that the inn and conference
17 center are, in fact, limited public forums or --
18 public forums as plaintiff suggests, then the State
19 can limit the groups that are allowed at the inn and
20 conference center, as long as it's not viewpoint
21 discriminatory. That the State could, for example,
22 decide to limit the use of the facilities to groups no
23 larger than 100 or prohibit all groups that have a
24 political message.

25 And an injunction would be harmful to the

1 general public. The Tennessee legislature has
2 determined that it is in the public's interest for
3 these commercial enterprises to be self-sustaining,
4 and an injunction would be inconsistent with that
5 public policy.

6 So, Your Honor, we just ask that you find
7 that the inn and conference center are nonpublic
8 forums, that the group reservation contract is content
9 neutral and reasonable and ask that you deny the
10 preliminary injunction.

11 THE COURT: Thank you.

12 MS. JORDAN: Do you have any questions
13 for me?

14 THE COURT: No.

15 Any brief response?

16 MR. IRION: Yes, Your Honor. Thank you.

17 Your Honor, the Tennessee statute
18 requiring government commercial entities to make money
19 is not the problem. The problem is the fact that the
20 State now wants to do that in violation of the law.
21 And just like any other business, they can't do that.

22 What we're asking the Court to do is not
23 find that statute void, but simply to strike an
24 illegal term from a contract that the State is putting
25 out. This is what courts do all the time. If a term

1 in a contract is illegal, they strike it.

2 And I'm so glad that the discussion of
3 hotels versus this particular facility came up because
4 if a -- if my clients were to rent a hotel in downtown
5 Nashville and 50,000 people came, showed up and
6 rioted, my clients would not be responsible for the
7 police efforts to quell other people's criminal
8 activities.

9 The State of Tennessee is a government
10 entity. It's not a private entity. And if we were
11 going with a private entity, then the private entity
12 would never have a term in there that says, well,
13 the -- if the police show up, we're going to charge
14 you \$20,000 for the police having to show up.

15 Because it's the State, the State seems
16 to think that normal police activities, which they,
17 according to the Sixth Circuit, have an affirmative
18 duty to protect the public in these circumstances and
19 according to the Supreme Court can never use a
20 heckler's veto protesters to stop First Amendment
21 rights, they think that the bringing out extra law
22 enforcement somehow should be assessed to the
23 organizers. And that's just wrong.

24 A government entity has to follow the
25 constitution. Private entities do as well; however,

1 as we all know the first element in any constitutional
2 claim is that the defendant is a government entity
3 acting under governmental authority. Just because
4 they're doing commercial activities doesn't -- they
5 still have to follow the constitution, as Your Honor
6 pointed out.

7 They have different requirements,
8 unfortunately, based on the fact that they are the
9 government. They have a lot of authority that private
10 entities simply don't have. Private entities, private
11 hotel couldn't call up and say, hey, send out a
12 hundred police officers.

13 They might send them out, but they
14 certainly don't have the authority to force them to
15 and then assess them a fee. The government does. The
16 fact that it's assessed afterward instead of ahead of
17 time is worse. That is a prior -- to the event
18 burdening on speech that's much worse than -- they're
19 saying ahead of time you have to pay the -- you have
20 to agree on a contract to be assessable for what other
21 individuals do and what we do in response to it and
22 it -- it's been made very clear it doesn't matter
23 whether or not they sit down ahead of time and discuss
24 how much security is necessary and the State agrees to
25 provide extra security.

1 That's all great, and I think that's a --
2 that's a fabulous thing that happens. And I think the
3 witness made it clear that my clients and the State
4 have had a good relationship and hopefully they will
5 continue to, to do those things.

6 But that doesn't remedy the fact that the
7 State is now asking my clients to open themselves up
8 contractually to an open-ended amount of assessment
9 ahead of time based on the activities of other people
10 and they have no authority to say whether or not the
11 response should happen at all.

12 Sorry, Your Honor. Now, regardless of
13 whether or not this is -- the case about the DNC. The
14 DNC convention happened in that case at a military
15 base. It was a naval port. That has never been a
16 public or a designated public forum. It's always been
17 a nonpublic forum. It's one of the three classic
18 nonpublic forums. So that case is completely --

19 THE COURT: You've probably never been to
20 the Navy peer in Chicago if you're making this
21 argument. Have you ever been there?

22 MR. IRION: I was in the Air Force,
23 Your Honor, but I've never been to that peer.

24 THE COURT: Well, okay. It's not what
25 you're saying. It is not a base. Not anymore.

1 MR. IRION: All right. Well, assuming
2 that this is a limited public forum or let's just say
3 from their own brief the defendants say the standard
4 that they're asserting is that it must not -- the
5 policy must not discriminate based on viewpoint and
6 must be reasonable in light of the purposes served, I
7 strongly disagree with that.

8 But even with that, we have a Supreme
9 Court case that says heckler's veto is viewpoint
10 discrimination. Viewpoint discrimination can -- it
11 just simply isn't allowed, according to the
12 defendant's own brief. And I agree, it's not allowed.

13 And heckler's veto -- if this is, in
14 fact, a heckler's veto, and what we've got here is the
15 State reacting to what they perceive is a danger based
16 on other people's activities, that's the definition of
17 a heckler's veto, Your Honor. They're wanting to
18 assess my clients a fee they wouldn't get anywhere
19 else based on the activities of other people.

20 Please give me a moment to go through my
21 list.

22 THE COURT: You're getting a little
23 bit -- you're getting a little bit repetitive. It is
24 5:30.

25 MR. IRION: I will wrap up. I also

1 apologize for getting a little animated.

2 THE COURT: That's quite all right.

3 MR. IRION: I get emotionally involved in
4 these kind of things. I've done several
5 First Amendment cases.

6 THE COURT: That's quite all right.

7 MR. IRION: I just wanted to mention
8 based on basic fairness, Your Honor. Essentially the
9 State is saying you can't speak unless you pay this
10 fee because your speech is offensive to other people.
11 And if I want to go and speak and it's not offensive,
12 it's not a problem.

13 As Your Honor well knows, the First
14 Amendment is intended to protect offensive speech,
15 unpopular speech, because unoffensive speech doesn't
16 need protection. The Supreme Court has made this
17 point --

18 THE COURT: Do we have any unoffensive
19 speech anymore in this country? I'm not sure we do.

20 MR. IRION: That's depends on who you're
21 talking to, I'm sure.

22 THE COURT: Well, I'm not sure it depends
23 on who you're talking to.

24 MR. IRION: Well, I think that the people
25 in this country need to be able to allow themselves to

1 be offended and still act legally and not criminally.
2 But, again, this is the problem is the criminal
3 activity of other people is preventing free speech.
4 The only reason I brought up -- not the only reason.
5 The *Bible Believers* case was a case that established
6 what should have already been pretty clear that the
7 police department has to protect people who are saying
8 things that are unpopular. They have an affirmative
9 duty to that.

10 We shouldn't -- we can't charge citizens
11 what -- for what the government pays to do its job.
12 That it has -- primarily the reason for existence is
13 to protect citizens and protect them to be able to
14 exercise their rights. And what we're seeing here is
15 a -- is a test where -- where the State of Tennessee
16 is trying to say, if you want to exercise those
17 rights, you have to pay for them.

18 THE COURT: Well, you know what? If they
19 just called in outside sources and didn't use park
20 rangers, we wouldn't even have this lawsuit, would we?

21 MR. IRION: Sure, but it's up to their
22 discretion, not my clients. My clients are having to
23 agree to allow them to decide, the State officials,
24 what resources they'll use, how much they're going to
25 cost. And that is clearly not allowed under *Forsyth*.

1 THE COURT: But if they -- if
2 Mr. Robertson didn't feel so strongly that it was his
3 obligation because it's his park, that he was the
4 first line, he had the first line responsibility for
5 security and simply when there was going to be a
6 security issue, if he just called in the highway
7 patrol, the TBI, all these outside groups that
8 basically can't charge your client for their security,
9 then we wouldn't have this lawsuit, would we?

10 MR. IRION: Well, actually, Your Honor,
11 this brings me to my last issue, which is the
12 subjective nature of the assessment. The problem with
13 the assessment is that a government official gets to
14 decide whether or not -- you know, how much and when
15 the resources are needed.

16 And in this case there's nothing in the
17 contract. The contract is very vague and open-ended
18 such that they could make the argument under the
19 language of the contract that any damage to the park
20 whatsoever done by anybody is a contractual obligation
21 of my client's. It actually reads that way.

22 THE COURT: So you're moving now to
23 damage, not to security costs. You're talking about
24 damage assessment.

25 MR. IRION: What I'm -- the assertions

1 that the State made, even if true, about damages not
2 being assessed, is not in the contract at all. And,
3 in fact, the first time I saw it raised at all was in
4 their opposition brief. I actually went back and
5 looked at the contract. I was very surprised.

6 And when I looked at the contract and the
7 affidavit very carefully, I was able to recognize what
8 they were saying was, well, damages by other people
9 are not assessed, even though you could make the
10 argument that they are under the language. What they
11 were really saying was, well, the law enforcement
12 requirements, the security requirements that were
13 performed by the rangers are assessed to my client.

14 So -- in any case, the contract terms are
15 illegal under the constitution. The Court certainly
16 has the authority to strike illegal contract terms.
17 And the last item was remedies. They were saying,
18 well, you know, the -- oh, I can't remember exactly.

19 THE COURT: No irreparable harm, is that
20 what you want to --

21 MR. IRION: Not the irreparable harm.
22 The fact that if my clients were to enter into this
23 contract, absolutely they have the right not to pay
24 when they are assessed and the State would then sue
25 them and they would have to incur legal fees, that

1 even if they won, they wouldn't be able to recover
2 under a contract.

3 They would probably -- it would probably
4 hurt their credit and that's just not the -- I mean,
5 this clearly is a situation that has to be remedied in
6 this court through equity, hopefully today or this
7 week.

8 Did Your Honor have any more questions?

9 THE COURT: No, I don't.

10 MR. IRION: Thank you very much. My last
11 comment is if the Court needs more judges, I think
12 there's lots of volunteers in the room that would
13 certainly take the job. I know I would. Thank you,
14 Your Honor.

15 THE COURT: Well, we have a nominee. He
16 just needs a vote of the Senate. That's our problem.
17 We have someone who's actually gotten through the
18 Judiciary Committee, but he's awaiting a vote of the
19 Senate.

20 MR. IRION: And they're kind of tied up
21 right now.

22 THE COURT: They're kind of tied up right
23 now.

24 This is a very interesting case, and I
25 will take it under advisement. And you may have a

1 very optimistic view of how quickly I can get an
2 opinion out, but I do feel I need to write an opinion
3 about this case. So I will be taking it under
4 advisement and getting to it as quickly as we can.

5 Thank you.

6 (Which were all of the proceedings had in
7 the above-captioned cause on the above-captioned
8 date.)

REPORTER'S CERTIFICATE PAGE

I, Roxann Harkins, Official Court Reporter
for the United States District Court for the Middle
District of Tennessee, in Nashville, do hereby
certify:

That I reported on the stenographic machine
the proceedings held in open court on October 4, 2018,
in the matter of NEW CENTURY FOUNDATION, ET AL v.
MICHAEL ROBERTSON, Case No. 3:18-cv-0839; that said
proceedings were reduced to typewritten form by me;
and that the foregoing transcript is a true and
accurate transcript of said proceedings.

This is the 22nd day of January, 2019.

s/ Roxann Harkins_____
ROXANN HARKINS, RPR, CRR
Official Court Reporter